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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

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PETITION FOR A WRIT OF CERTIORARI

Francis Edwin Bass, Jr., Marvin L. Jones, James R. Marvin, Wilton A. Hockenberry, Catherine Louise Moyers, John Gilreath, Mildred B. Jenkins, and J. Loring Jenkins, on their own behalf and on behalf of all others similarly situated,[1] hereby petition this Court for a writ of certiorari to the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina on petitioners' petition for rehearing (App. A *infra* at 1a-10a) is reported at 395 S.E.2d 171. Its original opinion

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[1] The class certified by the trial court includes approximately 70,000 similarly situated federal annuitants who have opted to join this suit. Transcript of Record ("Tr.") 58-72.

(App. B *infra* at 12a-20a), as well as the decision of the trial court (App. C *infra* at 21a-28a), are unpublished.

JURISDICTION

The Supreme Court of South Carolina issued its opinion reversing the trial court and denying petitioners' entitlement to tax refunds on May 23, 1990. App. B at 12a. Petitioners' timely petition for rehearing was denied on July 31, 1990. App. A at 11a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

This case arises in the wake of this Court's decision in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989), which invalidated Michigan's discriminatory taxation of annuities of retired federal employees. In *Davis*, this Court held that 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity, as derived from the Supremacy Clause, prohibit states from taxing federal annuitants more harshly than state annuitants. South Carolina, like Michigan and approximately twenty other states, exempted from state income taxation annuities of retired state and local employees while taxing annuities of retired federal employees. *See* S.C.Stat.Ann. § 12-7-435 (1976). Petitioners are a certified class of all retired federal employees, both civilian and military, who had paid South Carolina state income tax on their federal annuities.

After this Court's March 28, 1989 decision in *Davis* and before the deadline in South Carolina for filing

amended returns for refunds for the 1985 tax year, the South Carolina Tax Commission issued numerous news releases informing federal retirees that they could file amended tax returns with the State Tax Commission to protect their refund rights. App. D at 29a-35a. Petitioners accordingly submitted amended state income tax returns for the tax years 1985 through 1988 seeking refunds for all taxes they paid on that portion of their income consisting of federal retirement income. The South Carolina Tax Commission refused to grant any *Davis*-related refund claims. Tr. 35-36, 41. The claims of the class members and the named petitioners were specifically denied. Tr. 35-36.

Petitioners filed suit in Horry County Court of Common Pleas seeking refunds for taxes "erroneously, improperly or illegally assessed, collected or otherwise paid over to the [Tax] Commission." S.C.Stat.Ann. § 12-47-440 (1976). On June 8, 1989, a new state law, S.C.Stat.Ann. § 12-47-445, was enacted, effective immediately. This new statute purported to divest petitioners of their right under § 12-47-440 to obtain refunds. The Horry County Court certified a class action encompassing all *Davis*-related refund claimants on August 30, 1989. Tr. 58-72.

The trial court ultimately found that petitioners were entitled to refunds pursuant to state law, citing § 12-47-440 as well as a string of South Carolina judicial decisions. App. C at 21a-28a. The court also found that the State's after-the-fact passage of a statute purporting to limit petitioners' "vested right" to seek a refund had no effect as to the refunds sought, as the taxes in question all predated the statute in question. App. C at 24a-27a.

The State appealed. On May 23, 1990, the South Carolina Supreme Court issued a decision reversing the trial court's decision in favor of the refund claimants. App. B at 12a-20a. The basis for the reversal was the finding

that the *Davis* decision applied prospectively only. App. B at 17a-20a. On July 31, 1990, on petitioners' petition for rehearing, and following this Court's decisions in *American Trucking Ass'n* v. *Smith*, 110 S.Ct. 2323 (1990), and *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), the South Carolina Supreme Court amended its earlier decision, adding a suggestion that petitioners had not satisfied state tax refund requirements because the taxes in question had not been paid "under protest." App. A at 8a-9a. The question whether petitioners needed to file under protest had neither been argued nor briefed during the course of the litigation, nor had the issue been raised by proper exception as required under South Carolina appellate practice; rather, the issue arose for the first time in the South Carolina Supreme Court's July 31, 1990 amended opinion. Notwithstanding its reference to this issue, however, the court below explicitly concluded: "Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law." App. A at 9a. Thus no state law ground independently supports the decision below.

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the propriety of states retaining taxes imposed in violation of the Constitution of the United States. Common to several cases decided last Term and several pending this Term, this petition questions whether it is a proper judicial function for courts to decree the effective dates of decisions of this Court striking down state taxes on constitutional grounds.

In addition, this petition raises the specific question whether this Court's decision in *Davis* v. *Michigan* may in any circumstance be applied in a prospective-only fashion so as to deny tax refunds to federal retirees.

Like South Carolina and Michigan, approximately twenty other states granted tax preferences to state retirees that were not granted to federal retirees. While refund actions have been brought in each of these states, only one other case, besides the instant action, has reached a state court of last resort. In that case, the court held that refunds must be paid. *Hackman* v. *Director of Revenue*, 771 S.W.2d 77 (Mo. banc 1989), *cert. denied*, 110 S.Ct. 718 (1990). Lower state courts have split on the question of whether *Davis* must be applied retroactively. Review by this Court is needed to resolve this recurring issue of demonstrated complexity and divisiveness.

1. The court below wilfully and explicitly refused to give force and effect to the Constitution of the United States. Rather than enforce the applicable constitutional mandate in the case before it, the court below instead rejected that mandate, with only a promise to apply it in some unspecified future cases. No court can have such license.

The court below justified its refusal to order refunds on the basis of a putative "prospective-only" application of this Court's decision in *Davis* v. *Michigan*. That is, the court refused to order refund of the taxes, pretending instead that the taxes were constitutional when exacted. Thus, the court below treated *Davis* as if it were not a pronouncement of constitutional law, but instead as if it represented an amendment to the Constitution itself.

Setting the effective date of constitutional mandates is simply not a proper judicial function: courts are "to declare what the law is, not to prescribe what it shall be." *American Trucking Ass'ns*, 110 S.Ct. at 2343 (Scalia, J., concurring). *See also id.* at 2350 (Stevens, J., dissenting) ("adherence to legal principle requires that we determine the rights of litigants in accordance with our best current understanding of the law"). Decreeing

prospective-only effect to a court decision is nothing short of judicial legislation. *Mackey* v. *United States*, 401 U.S. 646, 681 (1971) (Harlan, J., concurring).[2] It is not within any court's power to amend the Constitution; similarly it cannot be within any court's power to decree when a particular provision of the Constitution shall take effect. Such decisionmaking is utterly and irreconcilably at odds with the judicial role.

This Court has pending, or has recently had before it, nearly a dozen cases questioning the prospective-only application of a decision invalidating state taxes. In all but one case (*Hackman* v. *Department of Revenue*), the state court refused refunds by denying retroactive effect to the decision invalidating the tax. And notwithstanding that the Court issued four opinions in this area last Term,[3] three cases in addition to this are already before the Court this Term challenging prospective-only application of decisions invalidating state tax schemes.[4]

Review by this Court is needed to provide guidance in this area of recurring litigation. Each case challenging a state tax on federal constitutional grounds should not

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[2] [T]he Court's assertion of power to disregard current law in adjudicating cases before us . . ., is quite simply an assertion that our constitutional function is not one of adjudication but in effect legislation. We apply and definitively interpret the Constitution, under this view, not because we are bound to, but only because we occasionally deem it appropriate, useful or wise. That sort of choice may permissibly be made by a legislature or a counsel of revision, but not a court of law.

See also Desist v. *United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

[3] *American Trucking Ass'ns; McKesson; National Mines Corp.* v. *Caryl*, 110 S.Ct. 3205 (1990); and *Ashland Oil Co.* v. *Caryl*, 110 S.Ct. 3202 (1990).

[4] *James B. Beam Distilling Co.* v. *Georgia*, U.S. No. 89-680; *Associated Grocers, Inc.* v. *Washington*, U.S. No. 90-281; and *Norwest Bank Duluth, N.A.* v. *Minnesota Commissioner of Revenue*, U.S. No. 90-645.

have to come before this Court twice—once on the merits and once again on the issue of relief. Extension of the *Griffith* rule[5] to this area of jurisprudence would eliminate this costly and needless second round of litigation. See *American Trucking Ass'ns*, 110 S.Ct. at 2343 (Scalia, J., concurring), at 2350 (Stevens, J., dissenting). In any event, analysis under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), has proved unworkable: the steady stream of cases to this Court challenging prospective-only applications demonstrates that the presumption of retroactivity inherent in our jurisprudence[6] has been reversed. So long as state courts have any leeway in determining when to apply this Court's mandates they will be urged to opt for "protective" (*i.e.*, nonretroactive) application. *National Can Corp.* v. *Department of Revenue*, 749 P.2d 1286, 1293 (Wash.), *appeal dism'd and cert. denied*, 486 U.S. 1040 (1988). At a minimum, review by this Court is needed to clarify the standards by which courts may depart from full retrospective operation of this Court's decisions to assure that prospective-only application, if at all permissible, is indeed the rare exception and not the rule.

2. The specific question presented in this petition, whether refunds of state income tax imposed in violation of 4 U.S.C. § 111 may be denied through a prospective-only application of *Davis* v. *Michigan*, is currently being litigated in approximately twenty states. Some courts have applied the *Chevron* test and concluded that refunds must be paid; other courts have concluded that *Davis* should be applied nonretroactively so as to deny

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[5] *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), held that new rules of criminal procedure must be applied retroactively to all cases pending on direct review or not yet final.

[6] *United States* v. *Security Industrial Park*, 459 U.S. 70, 79 (1982) (that "judicial decisions operate retrospectively . . . is familiar to every law student"); *Robinson* v. *Neil*, 409 U.S. 505, 507-08 (1973) ("general rule of retroactivity").

refunds. The question of the prospective/retrospective effect of Supreme Court decisions is ultimately a question of federal law. *Ashland Oil Co., Inc.* v. *Caryl*, 110 S.Ct. at 3204. Review by this Court is needed to conform the divergent opinions of the lower courts on this question.

As noted above, the Supreme Court of Missouri ordered that refunds be paid. *Hackman*, 771 S.W.2d at 81. Similarly, in New Mexico, refunds were mandated pursuant to the state refund statute, with retroactivity of *Davis* given as an alternative basis for refunds. *Burns* v. *New Mexico*, No. SF 89-1314(c) (1st Jud. Dist., Santa Fe County), Letter Decision, April 5, 1990. After this Court's decisions in *American Trucking Ass'ns* and *McKesson*, the State of New Mexico declined to appeal, and has now agreed to pay full refunds.

No other state has finally resolved this issue; however, several trial courts have followed Missouri's lead. For example, Arkansas has followed the Missouri analysis in awarding retirees full refunds. *Bosnick* v. *Pledger*, No. 89-1451 (Pulaski County Court), Findings of Fact and Conclusions of Law, November 1, 1989. In light of the dispositive state refund statute, the Arkansas court saw no reason to engage in the *Chevron* analysis.

In Colorado, full refunds were also ordered. *Reimer* v. *Dir. of Dept. of Revenue*, No. 89CV3837 (El Paso County Court), Order, April 13, 1990. The court held that refunds were required pursuant to the decisions in *Davis* and *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. 239, 247 (1931), both of which indicate that refunds must be paid "without reference to whether retroactive application of the ruling was a relevant concern." Order at 3. Moreover, the Colorado court found that even if the *Chevron* analysis were applied, full retroactivity of *Davis* would be required. *Id.* at 3-4.

Full refunds were also granted in New York. *Duffy* v. *Wetzler*, No. 7706/89 (S.Ct. of Queens County), Mem. Decision, April 13, 1990. The state refund statute pro-

vides for refund of "overpaid" taxes. As the state tax discrimination against federal retirees was improper, the court held that the state refund statute mandates that refunds be paid.

Similarly, refunds have been ordered in North Carolina, Michigan and Alabama. *Swanson* v. *North Carolina*, No. 90 CVS 03127 (Wake County Superior Court), Decision, Oct. 3, 1990; *Fonger* v. *Dept. of Treasury*, MTT No. 132625 (Michigan Tax Tribunal), Opinion and Judgment, June 11, 1990. The Michigan Tax Tribunal noted its explicit reliance upon the refund analysis applied in Missouri and New York. *Fonger* at 20. In Alabama, refunds were ordered based upon a finding that the *Davis* decision was "inevitable," thereby undercutting the State's claim that it could not have foreseen the outcome. *Rinehart* v. *Sizemore*, No. CV-89-704-M (Cir. Ct. of Montgomery County), Order, October 9, 1990, at 4.

In Arizona, the trial court held that full retroactivity of *Davis* was required under the *Chevron* analysis, because the balance of equities favored granting refunds to the extent the federal retirees were harmed by the discrimination. *Bohn* v. *Waddell*, No. TX 89-00050 (Arizona Tax Court), Opinion, April 6, 1990. Yet refunds were limited to the amount of taxes foregone by the state in not taxing their own annuitants rather than the taxes actually paid by the federal retirees. *Id.* at 37, 42-47.

In contrast, other state trial courts have denied all refunds, finding that the *Davis* decision does not apply retroactively. In *Harper* v. *Commonwealth*, No. CL891080 (Cir. Court for Alexandria), Order, March 12, 1990, a trial court in Virginia ruled that the *Chevron* test was applicable and required nonretroactive application of *Davis*. Similarly, a trial court in Montana refused to accord *Davis* retroactive effect. *Sheehy* v. *Montana*, No.

BDV-89348 (Mont. 1st Judicial Court), Order, July 11, 1990. Litigation in other states is ongoing: for example, cases are pending in administrative tribunals in Oklahoma and Louisiana, and in state courts in Georgia and Mississippi.[7]

There is a wide disparity in the results achieved and rationales employed by the lower courts in addressing the issue of refunds under *Davis*. Because resolution of these cases will focus on the retroactivity of *Davis*, the lower courts need a definitive interpretation of this federal question. Review by this Court is thus necessary to conform the diverse results and rationales of the lower courts and provide guidance on this question of substantial importance to numerous states and hundreds of thousands of retired federal employees.

3. The court below declined to give retrospective effect to *Davis* by purportedly "follow[ing] a *Chevron* analysis consistent with" that employed by this Court in *American Trucking Ass'ns*. App. A at 9a n.6. While the plurality opinion in *American Trucking Ass'ns* did authorize

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[7] In addition to the litigation referenced in the text, the following *Davis*-related refund actions are pending: in Colorado, *Kuhn* v. *Tipton*, No. 89CV9164 (Denver Dist. Ct.); in Georgia, *Wetzel* v. *Collins*, No. 1:89-CV-758-JOF (N.D. Ga.); in Iowa, *McManus* v. *Iowa*, No. C89-179 (N.D. Iowa); in Kansas, *Barker* v. *Kansas*, No. 89CV666 (Shawnee County Dist. Ct.); in Kentucky, *Gossum* v. *Kentucky*, No. 89-CI-248 (Marshall Cir. Ct.); in Louisiana, *Ponthier* v. *Sec. of Dept. of Revenue and Taxation*, BTA No. 3396 (Board of Tax Appeals), *Ponthier* v. *Broussard*, No. 344,035 (19th Jud. Dist. Ct.); in Maryland, *Doneski* v. *Comptroller of Treasury*, No. 3126 (Tax Court); in Massachusetts, *Filios* v. *Comm. of Revenue*, No. 171106 (Appellate Tax Board); in Mississippi, *Todd* v. *Tax Commission*, No. 139915, and *Winstead* v. *Marx*, No. 141652 (Chancery Ct., 1st Jud. Dist. of Hines County); in Oklahoma, *Worrell* v. *Tax Commission*, No. DR-016 (Ok. Tax Division); in Oregon, *Nutbrown* v. *Munn*, No. S36652 (Oregon Supreme Court); in Utah, *Brumley* v. *Tax Commission*, No. 89-0903618 (Utah Dist. Ct.).

Chevron analysis in cases such as this, the result reached by the court below is an untenable application of that analysis. Under the facts of this case, none of the *Chevron* factors justifying departure from the rule of full retroactivity is satisfied.

a. As a threshold matter, full retroactivity of a court decision may be denied only if the decision in question "establish[es] a new principle of law." *Chevron*, 404 U.S. at 106. If a decision does not "break" from past precedent, then there is no occasion to inquire whether it need be applied prospectively only. *See United States* v. *Johnson*, 457 U.S. 537, 550 and n.12 (1982); *McKesson*, 110 S.Ct. at 2247 n.15; *Ashland Oil* v. *Caryl*, 110 S.Ct. at 3204.

The court below held that *Davis* satisfied this threshold test because *Davis*, "for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee." App. A at 7a. The "clear past precedent" invalidated by *Davis*, the court concluded, was the absence of a previous challenge to the tax statute in question. *Id.* These holdings by the court below betray a complete misapprehension of the nature of *Chevron*'s threshold test.

That *Davis* "for the first time held that the doctrine of intergovernmental tax immunity" reached federal retirees does not satisfy the first *Chevron* test. There is something unique about virtually every case heard by this Court—if an issue has been resolved, it is hardly likely that this Court would grant certiorari merely to reiterate that holding. But not every case heard by this Court satisfies the threshold *Chevron* test; indeed it is the exceptionally rare case that "establish[es] a new principle of law" within the meaning of *Chevron*. A case, like *Davis*, that "simply appl[ies] settled precedent to a new set of facts" is not such a case. *United States* v. *Johnson*, 457 U.S. at 551.

The holding in *Davis* followed naturally and unexceptionally from settled law. The first aspect of the *Davis* decision, that retirement benefits were encompassed within 4 U.S.C. § 111, was established by Congressional intent in 1920 (*see, e.g.*, 59 Cong. Rec. 6300 (April 29, 1920) (statement of Rep. Hamill: federal pensions "should be looked upon as deferred wages")), and routinely confirmed in judicial decisions such as *Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The second aspect of the *Davis* decision, that the differential tax treatment of federal and state retirement benefits amounted to "discrimination" under 4 U.S.C. § 111, was no longer in question following *Phillips Chemical Co.* v. *Dumas*, 361 U.S. 376 (1960), and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983).[8] In truth, not a single new principle of law was established in *Davis*. *See Rinehart*, *supra*, at 4 (*Davis* was "inevitable"). Indeed, the *Davis* decision rested on precedent that had its genesis is *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

This Court's recent decisions in *Ashland Oil Co., Inc.* v. *Caryl*, 110 S.Ct. 3202, and *National Mines Corporation* v. *Caryl*, 110 S.Ct. 3205, well illustrate the error of the court below. In rejecting the claim of nonretroactivity in these cases, the Court held that the *Armco* decision (*Armco* v. *Hardesty*, 467 U.S. 638 (1984)) could not satisfy the threshold test under the *Chevron* analysis:

> *Armco* neither overturned established precedent nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, supra, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc.* v. *Washington State Dept.*

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[8] As stated in *Phillips Chemical Co.*, 361 U.S. at 385: "It does not seem too much to require that the State treat those who deal with the [federal] government as well as it treats those with whom it deals itself." *See Davis*, 489 U.S. at —— n.4, 109 S.Ct. at 1507 n.4.

> *of Revenue*, 483 U.S. 232 (1987), which arguably "overturned a lengthy list of settled decisions" and "revolutionized the law of state taxation," *id.*, at 257 (Scalia, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary.

110 S.Ct. at 3205 (footnote omitted).

Certainly *Armco* was far more novel than *Davis*. The *Davis* decision explicitly reveals its precedential basis, and finds the law to be settled. *Davis*, 489 U.S. at ——, 109 S.Ct. at 1504-08. By comparison, *Armco* formed the basis for a "revolutionary" extension of the "internal consistency test." *Ashland Oil*, 110 S.Ct. at 3205. If, as this Court held, *Armco* fails the first prong of the *Chevron* test because it "did not overrule clear past precedent nor decide a wholly new issue of first impression," 110 S.Ct. at 3205, then *Davis*, a less exceptional decision, necessarily falls short of the same *Chevron* standard. Accordingly, the determination by the court below that *Davis* satisfies the threshold *Chevron* test is clear error.

b. The second *Chevron* factor calls for courts to evaluate the purpose and effect of the constitutional rule in question and ascertain whether retrospective operation will further or retard the rule's operation. *Chevron*, 404 U.S. at 106. The court below concluded that this factor weighed in favor of nonretroactivity because South Carolina had repealed the statute in question. App. A at 7a. Yet this analysis says nothing: this Court in *Davis* invalidated the statute irrespective of whether the Legislature subsequently repealed it.

The court below found nothing to suggest that retroactive application of *Davis* would *retard* the operation of the Supremacy Clause, and thus its conclusion that this factor weighed in favor of nonretroactivity is untenable. More significantly, however, the court below overlooked the manifold ways in which retroactive appli-

cation of *Davis* is necessary to effectuate the purposes of the Supremacy Clause.

First, central to the Supremacy Clause is the tenet that federal statutory enactments supervene state laws. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Davis* rested not only upon the constitutional principle of intergovernmental tax immunity, but also upon the unambiguous force of the Public Salary Tax Act of 1939, 4 U.S.C. § 111. *Davis*, 489 U.S. at ——, 109 S.Ct. at 1503-07. The court below, by asserting the nonretroactivity of *Davis*, has effectively held that 4 U.S.C. § 111 did not apply in South Carolina until March 28, 1989 (when this Court decided *Davis*), fifty years after Congress passed the statute. Delaying the effective date of federal legislation is beyond the power of state courts and legislatures. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) at 439 ("States have no power by taxation or otherwise to reduce or impede powers vested in the general government."). Retroactivity of *Davis*, therefore, would directly further the fundamental Supremacy Clause principle that federal statutes upon enactment are the supreme law of the land.[9]

In addition, taxpayers have legitimate compensatory interests safeguarded by the Supremacy Clause. *See, e.g.*, *Green* v. *Mansour*, 474 U.S. 64, 69 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of the law"). Moreover, South Carolina's violation strikes at the heart of the purposes of the intergovernmental tax immunity doctrine—South Carolina's tax scheme caused the federal government to subsidize

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[9] Even after this Court's decision in *Davis*, South Carolina continued to collect the unconstitutional tax. *See* App. D at 33a. Indeed, in Mississippi, the State continued the discriminatory taxation until January 1, 1990. *See* Mississippi Code § 27-7-51 (3) (1990). Allowing states to defy Congress' statutory commands and the holdings of this Court turns the Supremacy Clause on its head.

state retirement benefits at the direct expense of federal employees. As this Court held in *Davis*:

> Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

489 U.S. at —— n.4, 109 S.Ct. at 1507 n.4. The legal principle at issue in *Davis* is the illegality of state taxation that causes the federal government and its employees to subsidize state employment costs. *Id.* Thus, partial retraction of that subsidy through retroactivity of *Davis* would directly effectuate the legal principle in *Davis*. *Compare American Trucking Ass'ns*, 110 S.Ct. at 2332 (retroactivity not necessary to effectuate purposes of Commerce Clause).

Further, to allow the states to retain unconstitutionally exacted taxes provides them with a naked financial incentive to collect taxes aggressively even where, as here, the tax causes unconstitutional financial harm to the federal treasury, and well-settled legal principles expose the illegality of the tax at the time it is collected. So long as a state may take refuge in prospective-only application of decisions invalidating its tax schemes, it will be encouraged to tax beyond constitutional limits. Retroactive application of *Davis* would sharply reduce the states' financial incentive for unconstitutional taxation.

Finally, retroactive application of *Davis* will cause refunds to be made to refund claimants. At current federal tax rates the United States government stands to obtain perhaps one-fourth or more of the refunds made to federal retirees. While retroactive application of *Davis* will not allow the federal government to recoup all the involuntary and unconstitutional subsidy it has been paying to South Carolina and other states for almost half a century, it will at least provide some recompense to the federal fisc. This recovery of improper subsidies would plainly further the purposes of the intergovernmental tax immunity doctrine.

c. The third *Chevron* factor calls for balancing the equities of prospective-only versus retroactive application of the decision. The court below concluded that this balance favored prospective-only application of *Davis* because "[t]he refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State." App. A at 8a. The court did not explain how this financial burden could be any heavier on the state, and all its taxpayers, than on the select minority of taxpayers who had unconstitutionally been forced to shoulder this burden. Therein lies its most egregious error.

With the possible exception of cases involving overturning of Supreme Court precedent, *see American Trucking Ass'ns*, 110 S.Ct. at 2334, as a matter of federal law, the equities favor the citizen's compensatory interests over that of a governmental entity. As stated in *Owen* v. *City of Independence*, 445 U.S. 662, 655 (1980):

> even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Federal law aside, it is simply more equitable to place the financial consequences of an unconstitutional income tax upon the government (and thus the citizenry as a a whole) than upon a select subclass of taxpayers who had unconstitutionally been forced to pay the tax in the first instance.

The court below held that equity tilts in the State's favor because it has already allocated the money petitioners claim as a refund. App. A at 8a. In so holding, it has artificially distinguished the State from its citizens and taxpayers: the question here is not whether the State, as

some abstract entity, needs the money more than the taxpayers from whom it unconstitutionally exacted the taxes, but rather whether taxpayers who have been paying more than their proper share of taxes should be reimbursed by those who have paid less.

At bottom, the holding below is simply that retroactive application of *Davis* is too expensive. But the purported magnitude of the refund claims cannot add any substance to the State's plea of inequity. It is indeed a perverse suggestion that the greater the magnitude of its constitutional violation, the stronger the State's equitable claim not to remedy it. The court below erred in adopting a rationale so deeply and fundamentally flawed.

4. The decision below contains a suggestion that state law might provide an independent ground for denial of refunds. This suggestion, however, poses no obstacle to granting the petition. First, the decision below explicitly abnegates reliance on state law grounds: "Because we find that *Davis* is not to be retroactively applied, we do not need to engage in any analysis of state law." App. A at 9a. As the South Carolina Supreme Court has denied reliance upon state law grounds, this Court possesses full authority to review the important federal question explicitly decided below, that is, whether *Davis* is to apply retroactively. *See, e.g., Lawrence* v. *Tax Comm. of Mississippi*, 286 U.S. 276, 282-83 (1932) ("illusory" or "unsubstantial" nonfederal ground for decision below poses no impediment to this Court's jurisdiction).

Second, even had the court below relied on the state law ground referenced in its decision (despite its explicit disavowal of such reliance), the ostensible state law ground itself would generate an issue of federal law. Specifically, the decision below purports to fault petitioners for failing to pursue their refund claims by paying the taxes "under protest." App. A at 9a. This "pay under protest" rule, suggests the court below, is a "procedural requirement" on postdeprivation relief sanctioned by this

Court in *McKesson. Id., citing McKesson*, 110 S.Ct. at 2254.

This reliance on *McKesson* is wholly misplaced: while *McKesson* does authorize procedural limitations on refund actions, it reaffirms the rudimentary constitutional principle that taxpayers must be afforded a "clear and certain" postdeprivation remedy. 110 S.Ct. at 2251, *quoting Atchison T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912). Under the facts of this case, South Carolina's "pay under protest" procedure is anything but a clear and certain remedy sufficient to meet petitioners' Fourteenth Amendment rights.

The record here shows that: immediately after *Davis* was decided, and through the April 15, 1989 deadline for filing state tax returns, the State Tax Commission explicitly informed taxpayers to follow the "amended return" method for claiming refunds, App. D at 29a-35a; the state statute under which petitioners sued (S.C.Stat.Ann. § 12-47-440) expressly authorizes refund claims for "voluntarily" paid taxes;[10] the South Carolina Supreme Court had held, as recently as 1987, that "voluntary" payments of unconstitutional taxes could be recovered through the statutory method chosen by petitioners (*Multi-Cinema, Ltd.* v. *South Carolina Tax Commission*, 357 S.E.2d 6, 7 (S.C. 1987)); the State Tax Commission had never before denied an income tax refund

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[10] The statute provides in pertinent part:

> Notwithstanding any other provision of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid . . . the taxpayer . . . may make application to the Commission to abate or refund in whole or in part such license fee or tax. . . . The provisions of this section shall apply whether or not the fee or tax in question was paid under protest . . . .

S.C. Stat. Ann. § 12-47-440. Title 12 of the South Carolina Code is entitled "Taxation," and it includes the income taxes at issue here. S.C. Stat. Ann. § 12-7-435.

for failure to pay under protest; the purported change to a "pay under protest" procedure was neither raised nor argued nor briefed by the State Tax Commission throughout this litigation; the trial court held that relief was available under § 12-47-440; concomitant with its repeal of the discriminatory tax scheme, the South Carolina Legislature specifically amended § 12-47-440 so that refunds would not be available to *Davis* claimants; and the State Supreme Court's original decision (App. B at 12a-20a) included no reference to a "pay under protest" requirement, but instead cited without comment the fact that petitioners had proceeded under § 12-47-440. App. B at 16a. Given this record, petitioners had no "clear and certain" remedy.

To the extent that the court below reversed itself in holding § 12-47-440 inapplicable here, its decision extinguishing petitioners' rights under that section is itself a denial of due process. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."). But even if § 12-47-440 did not apply to petitioners, then the confusion engendered by its existence (a confusion spawned by the plain language of the relevant statutory provision and the State Supreme Court's interpretation of that provision, and a confusion shared by the Tax Commission, the South Carolina Attorney General and the South Carolina Legislature) negates petitioners' constitutional right to a clear and certain remedy.

Petitioners' long-established remedial rights have been undercut through a questionable recasting of state tax procedures. Although the construction of § 12-47-440 by the court below is quite dubious, that question of state statutory construction need not be reviewed here. *Cf.*

Lawrence, 286 U.S. at 282-83 (inquiry into validity of purported state law ground is proper to assess whether purported ground is "unsubstantial" or "illusory"). Instead, the federal issue squarely raised is whether, on this record, petitioners' constitutional entitlement to a "clear and certain remedy" for unconstitutional deprivations has been infringed in violation of *McKesson*, 110 S.Ct. at 2251. We submit that this right has not only been infringed, it has been gutted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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October 24, 1990

APPENDICES

APPENDICES

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Amended Opinion No. 23216

Heard May 7, 1990—Filed August 6, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to one of South Carolina's refund statutes, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the trial court which granted federal retirees a re-

fund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway

tax which treated truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysise consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him

. . . ," mandated retroactive application of a constitutional decision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as al-

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[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

ways mandating a tax refund when a statutory scheme is found to be unconstitutional.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactivity question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the in-

justice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis* represents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approxi-

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

mately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no need to examine state law.

Even were we to examine state law, the federal retirees would be barred from receiving a refund. The

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. §§ 12-47-210 and 12-47-220 (1976), which require the taxpayer to pay under protest before bringing a refund action.[5] We have previously stated that the exclusive remedy for the recovery of the erroneous assessment of income taxes is through these "pay under protest" statutes. *See, Perpetual Bldg. & Loan Ass'n of Columbia v. South Carolina Tax Commission*, 255 S.C. 180 S.E.2d 195 (1971). The recent United States Supreme Court case of *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco*, Op. No. 88-192 (U.S. filed June 4, 1990) reaffirms a state's ability to establish procedural requirements which must be complied with before a refund action is permitted. Here, the federal retirees did not comply with the "pay under protest" procedural mandates.

II. CONCLUSION

Under the *Chevron* test, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are not entitled to a refund of income taxes collected prior to that time.[6] Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income

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[5] Section 12-47-440 under which the federal retirees proceeded, deals only with the recovery of license fees and taxes. *See, City of Columbia v. Glens Falls Insurance Company*, 245 S.C. 119, 139 S.E.2d 529 (1964).

[6] In *American Trucking Associations, Inc. v. Smith*, Op. No. 88-325 (U.S. filed June 4, 1990), the United States Supreme Court followed a *Chevron* analysis consistent with that employed by this Court.

tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

THE SUPREME COURT OF SOUTH CAROLINA

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

ORDER

The petition for rehearing in the matter of *Bass, et al. v. State of South Carolina, etc., et al.*, Op. No. 23216 (S.C. filed May 23, 1990) is denied. Additionally, the above referenced opinion is withdrawn and the following amended opinion is hereby issued in its place with additions or changes being made at the following places:

Page 2; Line 9 (Changes Made).

Pages 5-6 (Paragraph Added).

Page 6 (Footnote Nos. 5 and A Added).

/s/ [Illegible], C.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

/s/ [Illegible], A.J.

Columbia, South Carolina

July 31, 1990

APPENDIX B

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH, MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit of all others similarly situated,

Respondents/Appellants,

v.

STATE OF SOUTH CAROLINA, a body Politic, and THE SOUTH CAROLINA TAX COMMISSION,

Appellants/Respondents.

Appeal From Horry County
Kaye G. Hearn, Judge
Sidney T. Floyd, Judge

Opinion No. 23216

Heard May 7, 1990—Filed May 23, 1990

REVERSED

Chief Deputy Attorney General Joe L. Allen, Jr., Deputy Attorney General Ray N. Stevens, and Assistant Attorney General Arlene D. Hand, all of Columbia, for Appellants/Respondents.

Gene M. Connell, Jr., of Kelaher, Haar, Bass & Connell, of Surfside Beach, for Respondents/Appellants.

PER CURIAM: This action was commenced by federal retirees against the State of South Carolina and the South Carolina Tax Commission (hereafter, collectively referred to as the "State") on April 4, 1989. The action was brought because of a March 28, 1989 United States Supreme Court decision, *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), in which it was held that state taxation of income of persons retired from employment or service with the federal government at a greater rate than the taxation of income of persons retired from state service, violated the doctrine of intergovernmental tax immunity and was thus constitutionally prohibited.

Prior to the *Davis* decision, South Carolina had a statute that granted retired federal employees a $3000.00 exemption of retirement income from South Carolina income tax while retired state employees received a total exemption of their retirement income from South Carolina income tax. Since the *Davis* decision, South Carolina's income statute that applies to state and federal retirees has been amended so as to comply with *Davis*. However, the federal retirees claimed and the trial court agreed that the federal retirees were entitled to a refund for income taxes paid during the tax years of 1985 through 1988 pursuant to South Carolina's refund statute, S.C. Code Ann. § 12-47-440 (1976). Although both parties appeal, the primary issues before this Court are whether: (1) the *Davis* decision should be applied prospectively from March 28, 1989, so as to deny federal retirees refunds, and (2) the enactment of S.C. Code Ann. § 12-47-445 (1989) operates to bar the federal retirees' claim for refunds. We reverse the order of the

trial court which granted federal retirees a refund of income tax collected by the state for the years 1985 through 1988.

I. DISCUSSION

PROSPECTIVE APPLICATION OF DAVIS

The United States Supreme Court did not announce whether its decision in *Davis* had retrospective or prospective application because Michigan conceded that "to the extent appellant had paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis v. Michigan Dept. of Treasury*, —— U.S. at ——, 109 S.Ct. at 1508-1509, 103 L.Ed.2d at 906. Here however, there is no such concession. Therefore, in order to determine whether federal retirees are entitled to a refund for monies paid under South Carolina's former discriminatory tax laws, we must first determine whether the holding of *Davis* is to be applied retroactively or prospectively. The State argues that we should apply the test announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to determine whether *Davis* should be applied retrospectively or prospectively. By application of this test, the State contends that *Davis* need only be applied prospectively and the federal retirees would not be entitled to a refund. We agree.

Although this particular issue is one of first impression in this State, particularly in light of the fact that *Davis* was only recently decided, other courts such as the Arkansas Supreme Court in *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), have been faced with a similar question. In *Gray*, the Arkansas Supreme Court was faced with whether to apply the United States Supreme Court opinion in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) retrospectively or prospectively. In *Scheiner*, the United States Supreme Court held that another state's highway tax which treated

truckers whose base of operation were outside the state, differently from those based in the taxing state, violated the commerce clause. In response to the *Scheiner* decision, the Arkansas Supreme Court struck a similar taxing provision in *Gray*. After applying the test announced in *Chevron* for determining whether a judicial decision should be applied retroactively or prospectively, the Arkansas Supreme Court held that the United States Supreme Court decision in *Scheiner* should have prospective application only. Consequently, out-of-state truckers were denied refunds of taxes paid prior to the United States Supreme Court decision in *Scheiner*.

The Georgia Supreme Court has also followed an analysis consistent with *Gray* in an action for a refund of taxes. In *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the distilling company sought a $2,400,000.00 refund for excise taxes paid in 1982, 1983, and 1984 pursuant to a Georgia statute, Ga. Code Ann. § 3-4-60 (1982), which imposed a higher tax on alcoholic beverages imported into Georgia than on those manufactured in Georgia. The statute was amended in 1985, shortly after the United States Supreme Court found a similar statute to be unconstitutional. *See, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The lower court found that the pre-1985 Georgia statute was unconstitutional because it violated the commerce clause of the United States Constitution, but that the ruling would only be applied prospectively so that the distilling company was not entitled to a refund.

On appeal, the distilling company argued that the lower court erred in applying the decision prospectively only and argued that Ga. Code Ann. § 48-2-35(a) (1982) which provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . .," mandated retroactive application of a constitutional de-

cision. In rejecting the latter argument, the Georgia Supreme Court noted that the statute did not describe how it should be determined that a tax was "illegally assessed" and that the statute did not address the issue of retroactive versus prospective application of a constitutional decision.[1] In affirming the lower court's decision that the distilling company was not entitled to a refund, the Georgia Supreme Court first applied the test set forth in *Chevron* to determine whether to retroactively or prospectively apply a judicial decision, and found that only prospective application of the decision was appropriate. In holding that the decision should not be applied retroactively, the Georgia Supreme Court did not need to examine state law, primarily the refund statute, as to how to apply the decision retroactively.

Only one appellate court has had the opportunity to review specifically whether *Davis* should be applied retroactively or prospectively. In *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d 77 (Mo. 1989), the Missouri Supreme Court held that under *Davis*, Missouri's tax scheme which discriminated between state and federal retirees, violated the principles of intergovernmental tax immunity, and that the federal retirees were entitled to a refund under its statute. Rather than addressing whether *Davis* was to be applied retrospectively or prospectively, the majority in *Hackman* made a "quantum leap" from a determination that Missouri's tax law was unconstitutional, to a determination that refunds were due vis-a-vis its interpretation of Missouri's refund statute. It appears that the majority in *Hackman* interpreted the Missouri refund statute as always mandating a tax refund when a statutory scheme is found to be unconstitutional.

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[1] S.C. Code Ann. § 12-47-440 (1976), under which the federal retirees proceed for their refund allows an action for taxes "erroneously, improperly or illegally assessed . . ." This statute like the one in *Beam*, does not address the issue of retroactive versus prospective application of a constitutional decision.

We find that the analysis employed by the majority in *Hackman* is flawed in that the majority should have first determined under *Chevron*, whether *Davis* should be retrospectively or prospectively applied. Only upon a finding that *Davis* is to be retrospectively applied would the court need to examine state law to determine how to apply the *Davis* holding retroactively. On the other hand, upon a finding that *Davis* should only be applied prospectively, no further inquiry is needed. This analysis is consistent with that used by the Arkansas Supreme Court in *Gray* and the Georgia Supreme Court in *Beam* and additionally, is consistent with that suggested by the dissenting opinion in *Hackman*.

Hence, we will proceed under the United States Supreme Court's three-pronged test which was set forth in *Chevron* to determine whether prospective application of *Davis* is warranted. *Chevron* sets forth three factors that must be considered in cases dealing with the retroactively question:

(1) Consider whether the decision to be applied establishes a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

"It cannot be disputed that *Davis* represents both a new principle of law and a case of first impression." *Hackman v. Director of Revenue, State of Missouri*, 771 S.W.2d at 86 (Welliver, J., dissenting). The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to the retirement income of a federal retired employee. Prior to *Davis*, the State taxed some of the income of federal retirees and exempted the income of state retirees. This began in 1945 by the exemption of the benefits paid state retirees.[2] No similar provision existed that exempted all of the retirement income of federal retirees. During this time, federal retirees residing in South Carolina paid the tax without protest and did not raise the issue of intergovernmental tax immunity. Both the State and the federal retirees relied upon this tax treatment during this time. The *Davis* decision invalidated that clear past precedent and established a new principle of law. The first prong of the *Chevron* test is satisfied.

As to the second prong of the *Chevron* test, the Georgia Supreme Court in *Beam* held that it had no application "because the statute at issue was repealed . . ." Similar circumstances exist here. During all the years that the taxes were collected from the federal retirees, the State had no reason to believe the tax was unconstitutional. As soon as the State became aware of the unconstitutionality of the differential tax treatment between federal and state retirees, the legislature rectified the defects. Thus, the first and second prongs of the *Chevron* test appear to favor the prospective application of *Davis*.

All that remains to be considered is the third prong of *Chevron*, the weighing of the equities. If *Davis* is applied retroactively, the State faces liability for approximately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid

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[2] Act No. 157, § 13, 1945 S.C. Acts 223.

statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State.

We find that all parts of the *Chevron* test have been met and weigh heavily in favor of the prospective [3] application of the new principle of law contained in the *Davis* decision. Because we have not applied *Davis* retroactively and no refund is mandated [4] under our analysis, there is no need to examine state law.

II. CONCLUSION

Under the *Chevron test*, we find that *Davis* is to be prospectively applied from the date the opinion was rendered, March 28, 1989, and that the federal retirees are

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[3] This court has previously refused to give a United States Supreme Court decision retroactive effect based upon the impact of the decision on the State. *See Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (1984) (refusal to apply *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) retroactively because it "would disrupt the orderly process of probate" in South Carolina). *Wilson* has since been modified. *See, Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988).

[4] Although the federal retirees cite several United States Supreme Court cases for the proposition that the State cannot retain unconstitutionally collected taxes because a denial of refunds is itself a violation of constitutional rights, this argument is without merit. Those cases cited by the federal retirees for support of this proposition involve situations where the payment of taxes was made under protest or was compulsory (as where property is threatened to be seized or sold if taxes are not paid) rather than voluntary. *See Ward v. Board of County Com'rs of Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). In this case, the payments made by the federal retirees were voluntary, not coerced.

not entitled to a refund of income taxes collected prior to that time. Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law. Further, as the federal retirees are not entitled to relief, we do not need to address whether this action was properly maintained as a class action or whether the trial judge applied the proper interest rate to the refunds. The order of the trial court which granted the federal retirees a refund of income tax collected by the State for the years 1985 through 1988 is

REVERSED.

/s/ [Illegible] C.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

/s/ [Illegible] A.J.

APPENDIX C

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Case No. 89-CP-26-1136

FRANCIS EDWIN BASS, JR.; MARVIN L. JONES; JAMES R. MARVIN, WILTON A. HOCKENBERRY; CATHERINE LOUISE MOYERS; JOHN GILREATH; MILDRED B. JENKINS; J. LORING JENKINS, individually and for the benefit and on behalf of all others similarly situated,

Plaintiffs,

versus

STATE OF SOUTH CAROLINA, a body politic, and the SOUTH CAROLINA TAX COMMISSION,

Defendants.

ORDER FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY GRANTED TO THE PLAINTIFFS' AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DENIED

This is a class action brought by federal retirees to recover, pursuant to § 12-47-440, South Carolina Code of Laws, 1976, income taxes paid to the state upon retirement or pension income. Causes of action as to conversion and 42 U.S.C. § 1983 have been voluntarily dismissed without prejudice by the Plaintiffs with the ap-

proval of the Court. I find the Plaintiff class is entitled to partial summary judgment as to liability and order the Defendants to effect refunds of all taxes paid by class members on such income for the years 1985 through 1988.

This lawsuit was brought after the recent United States Supreme Court decision of *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989). In that case, the Court held that 4 U.S.C. § 111 precludes states from taxing the income of a retired federal employee differently than the income of a retired state employee. The South Carolina Income Tax statutes have required retired federal employees to pay income taxes while retired state employees were exempt. The South Carolina legislature corrected the tax statutes; however, Plaintiffs have filed this action for refunds of taxes paid for the last four years pursuant to § 12-47-440 of the South Carolina Code of Laws, 1976.

It is significant that the statutes have been amended by the General Assembly since the publication of the *Davis* opinion and the bringing of this class action. State and federal retirees' pension are now taxed equally. The statutes appear below in their pre-amendment form.

> § 9-1-1680. EXEMPTION FROM TAXATION AND LEGAL PROCESS: ASSIGNMENT. The right of a person to an annuity or retirement allowance or to the return of contributions, an annuity or retirement itself, any optional benefits, or any other right accrued or accruing to any person under the provisions of this chapter, and the monies of the system created hereunder are hereby exempted of any state or municipal tax, . . .
>
> § 12-7-435. DEDUCTIONS. There is allowed as a deduction from South Carolina taxable income of an individual the following amounts:
>
> a. Any retired person, or his surviving spouse, who receives a federal civil service retirement an-

nuity is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of the annuity received each taxable year exclusive of any exemption. . .

b. Any person retired from the uniformed services of the United States with 20 or more years active duty service, or his surviving spouse, is allowed to deduct from taxable income Three Thousand and No/100 ($3,000.00) Dollars of his uniformed services retirement pay received each taxable year. . .

* * *

d. All amounts received from the South Carolina Retirement System as provided in Title 9. . .

A review of these statutes reveals no difference in comparison to the statutes of Michigan which were struck down in *Davis*. The *Davis* Court stated that significant differences must exist between classes to justify dissimilar tax treatment. In this light, I am mindful that equal protection and due process concerns bear on the issues before me. *See, Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L.E. 265 (1931); *Allegheny Pittsburgh Coal Company v. County Commission*, —— U.S. ——, 109 S.Ct. 633 (1989).

The Courts of Missouri, Arkansas, and Arizona have all considered issues identical to those in this case and have ordered refunds pursuant to *Davis*. The statutory refund procedures of each of these states are substantially identical to those of South Carolina in that each provides an applicable statute of limitations for refunds, each requires a claim to be filed with the Tax Commission, and each addresses circumstances upon which refunds will be appropriate. *See, Hackman v. Director of Revenue and the State of Missouri*, Opinion No. 71628, filed May 25, 1989; *Stanley Bosnick as Class Representative v. State of Arkansas*, Opinion No. 89-1451, filed

November 16, 1989; and *Bohn v. Waddell*, Superior Court of Arizona, Opinion No. TX 89-00050, Maricopa County, August 15, 1989.

At least 43,857 applicants have already filed for refunds pursuant to § 12-47-440 for the years 1985 through 1988. The majority of those refund applications were filed between the date the *Davis* decision was published and the date of enactment of § 12-47-445, June 8, 1989. I find that each individual class member who has filed a refund application for the years 1985 through 1988, or who shall henceforth properly file such an application within statute of limitations periods, is entitled to a refund in such amounts as he or she were illegally or improperly assessed.

Section 12-47-440 states that any tax erroneously, improperly or illegally assessed may be refunded. Substantial case law in this state is in accord that taxes which were erroneously, illegally or improperly assessed should be refunded. *See, American Hardware Supply Co. v. Whitmire*, 278 S.C. 607, 300 S.E.2d 289 (1983); *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1965); *Multi-Cinema Ltd v. S.C. Tax Commission*, 292 S.C. 411, 359 S.E.2d (1988).

Another issue before me concerns § 12-47-445. It states:

> A. Article 5, Chapter 47, Title 12 of the 1976 Code is amended by adding:
>
> "§ 12-47-445. The provision of § 12-47-440 do not apply to claims for abatement or refund resulting from a decision of a court of competent jurisdiction declaring a tax law of this state unconstitutional or otherwise unlawful. For purposes of this section, a final decision is the decision of a court declaring the law unconstitutional or otherwise unlawful and from which the appropriate officials of this state cannot or do not take an appeal or request a rehearing."

B. This section takes effect upon approval by the Governor.

Section 12-47-445 was not effective until it was signed by the Governor on June 8, 1989 and does not effect the taxes on retirement and pension income paid by the Plaintiff class for the years 1985 through 1988. Recent Supreme Court decisions involving the Tax Commission have held that individuals filing prior to the effective date of new tax legislation are entitled to protection under the previous law. *See, South Carolina National Bank v. South Carolina Tax Commission,* —— S.C. ——, 376 S.E.2d 512, (1989).

If § 12-47-445 were retroactive, it would have the effect of cutting off vested rights. *See, Vogel v. City of Myrtle Beach,* 291 S.C. 229, 353 S.E.2d 137 (1983). There also would be grave constitutional questions. *See, Duke Power Company v. South Carolina Tax Commission,* 81 F 2d 513 (1936); *Bradley v. Schoot Board of the City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006 (1974). The law in South Carolina provides that statutes are to be construed prospectively and not retroactively unless there is clear legislative intent. I will not construe § 12-47-445 to apply to any refunds for the period from 1985 through 1988 without express statutory provisions and I further find that those individuals who filed refund applications after the enactment of § 12-47-445 shall be entitled to refunds for taxes paid before the enactment of that particular section.

I have reviewed examples of retroactive tax legislation including § 12-37-27 which specifically provided that it would affect vehicle registrations and license plates prior to its effective date. I find no such clear pronouncement in § 12-47-445 and am required to construe this statute as prospective. *See, Bartley v. Bartley Logging Co.,* 293 S.C. 88, 359 S.E.2d 55, (1987); *Boyd v. Boyd,* 277 S.C. 416, 289 S.E.2d 153 (1982); *Lindsay v. National Old*

Line Insurance Co., 262 S.C. 621, 207 S.E.2d 75 (1974). I am further satisfied that § 12-47-445 only amends and does not destroy the right of this Court to order tax refunds under § 12-47-440.

South Carolina law states that taxing statutes are not to be construed beyond the clear import of their language. Any substantial doubt as to the meaning of tax statutes is to be resolved in favor of the taxpayer. *Southeastern Fire Insurance Co. v. South Carolina Tax Commission*, 253 S.C. 407, 171 S.E.2d 355 (1969); *Ryder Truck Lines v. South Carolina Tax Commission*, 248 S.C. 148 (1966), 149 S.E.2d 435 (1966). The law in this state also provides that statutes authorizing suit for recovery of taxes paid will be liberally construed in the favor of the taxpayer. *Columbia Gas Light Company v. Mobley*, 139 S.C. 197, 137 S.E. 211 (1927); *Cooper River Bridge v. South Carolina Tax Commission*, 182 S.C. 72, 188 S.E. 508 (1936).

Our Supreme Court has further stated that the tax laws shall never be construed to require an individual class to contribute more than its fair share of the public burden. *Crescent Manufacturing Company v. Tax Commission*, 124 S.C. 761, 129 S.E. 480 (1924).

All of these cases bring me to the conclusion that § 12-47-445 is to be construed as prospective only and is not to effect any of the refund claims for the years 1985 through 1988, regardless of whether they were filed before or after the enactment of § 12-47-445. The feeling of this Court was echoed in a recent tax refund case, *Pittsburgh and Midway Coal Mining Company v. Arizona Department of Revenue*, Arizona Supreme Court No. CV-87-0460-PR, filed July 13, 1989. In that case, the Arizona Court of Appeals stated:

> "An honorable government would not keep taxes to which it is not entitled and the legislative scheme supports that result." *Id.* at 12.

I further note that this decision needs to address only refunds of taxes pursuant to § 12-47-440 since the legislature has corrected the relevant laws to provide that federal retirees and state retirees are taxed equally. I do not need to decide whether the prior statutes are unconstitutional.

The Court is not unmindful that this is a unique case. However, we are benefited by the guidance of the highest judicial authority in this country as embodied in *Davis v. Michigan, supra.* I understand the plight of the state, but am compelled by the authorities presented to order refunds for all members of this class. Ultimately, this decision is based on a view of fairness and equity as it appears that the interest of one class of citizens has been systematically denied in favor of a second class.

Based on the foregoing, it is

ORDERED that the partial summary judgment sought by the Plaintiff class as to liability is granted and Defendants' Motion for Summary Judgment is denied. It is

FURTHER ORDERED that all class members (approximately 43,857) who are stipulated to have filed refund applications be refunded such tax amounts as may be appropriate for each plus prejudgment interest at 6% per annum from the date those taxes were paid pursuant to § 12-47-60 of the South Carolina Code of Laws. Post judgment interest is awarded at the same interest rate; however, it will cease when the Defendants form the interest bearing common fund. It is

FURTHER ORDERED that class members who have filed or who shall file, refund applications for years 1985 through 1988, after June 8, 1989, but within applicable statute of limitations time frames, shall be refunded such tax amounts as may be appropriate plus interest. It is

FURTHER ORDERED that the Defendants are to submit to the Court, within sixty (60) days, a plan for providing notice to all class members of their rights to refunds and as to the establishment of an interest-bearing common fund to be used to deposit and distribute such refunds in an orderly fashion. The amounts to be placed in the common fund shall be determined by the Defendants, subject to any objection by the Plaintiff class and review by the Court, and the common fund shall be increased as subsequent refund applications are received for the years 1985 through 1988. The costs of the notices and related expenses to all class members shall be borne *pro rata* by the Plaintiff class members and shall be deducted from the common fund as shall attorney's fees for Plaintiffs' counsel which shall be determined at a separate hearing.

AND IT IS SO ORDERED.

/s/ _____

SIDNEY T. FLOYD
Resident Judge of the
Fifteenth Judicial Circuit

January 19, 1990

Conway, South Carolina

APPENDIX D

RESPONDENTS/APPELLANTS' "EXHIBIT 4"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 2, 1989
URGENT

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 14 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or any prior years until directed to do so by the courts or

the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return for the 1985 tax year by April 15, 1989. These amended returns will be held for review.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpayers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.

To file a 1985 amended return, taxpayers should complete form SC1040X and mail it no later than April 15 to a special post office box established by the Tax Commission for this purpose. The mailing address is: SCTC-FRA, P.O. Box 12265, Columbia, SC 29211-2265.

RESPONDENTS/APPELLANTS' "EXHIBIT 5"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 5, 1989

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

HOW FEDERAL RETIREES CAN PROTECT A POSSIBLE 1985 REFUND

The United States Supreme Court on March 28 ruled that states must provide for equal taxation of federal and state retirement benefits. The ruling affects at least 14 states, including South Carolina.

South Carolina's legislature is currently examining the impact of the ruling on the state's tax laws and its potential effect on state revenue. At this time, however, no laws have been changed and taxpayers must report their federal retirement benefits as income on their 1988 income tax return as they have done in the past.

If state law is changed to exempt federal retirement benefits from South Carolina income tax, taxpayers may be eligible for a refund of taxes paid on those benefits.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers have two options to protect a possible refund for the 1985 year:

1. The federal retiree may write a letter to the South Carolina Tax Commission, including the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are applying for a re-

fund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits.

2. The federal retiree may file an amended return, Form SC1040X, for the 1985 year. The return should include the 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+".

Taxpayers may choose which one of the two methods is simpler for them. Letters or amended returns must be postmarked no later than April 15, 1989, to protect the statute.

Letters and amended returns should be mailed to:

SCTC - FRA

P.O. Box 12265

Columbia, S.C. 29211-2265

RESPONDENTS/APPELLANTS' "EXHIBIT 6"

SOUTH CAROLINA TAX COMMISSION

NEWS RELEASE

301 Gervais St., P.O. Box 125, Columbia, SC 29214

For release:
April 10, 1989

Contact:
(803) 737-4406

Vicki Jinnette
(Media Use Only)

NO CHANGE IN STATE'S TREATMENT OF FEDERAL RETIREMENT BENEFITS

South Carolina income tax laws affecting federal civil service retirement benefits have not changed as a result of a United States Supreme Court ruling. The South Carolina Tax Commission will continue to enforce state laws exempting $3,000 of federal civil service pensions while allowing state employee pensions to be fully exempt from state income tax.

The Supreme Court on March 28 ruled that a Michigan law taxing state and federal pensions differently was unconstitutional. The ruling affects at least 15 states, including South Carolina.

A change in South Carolina's income tax laws will require action by the state legislature or the courts. Until such action occurs, taxpayers should not do anything differently with their 1988 state income tax return or their 1989 estimated tax payments.

The Tax Commission does not have the authority to issue refunds on federal retirement benefits for 1988 or any prior years until directed to do so by the courts or

the General Assembly. No refunds will be made under the current law in South Carolina.

To protect themselves against the expiration of the three-year statute of limitation, taxpayers can file a South Carolina amended tax return, Form SC1040X, for the 1985 tax year by April 15, 1989. The return should include: 1) Name, 2) Address, 3) Social Security number, 4) state on the back of the return that a refund is being sought for taxes paid on federal retirement benefits, and 5) on line 23, enter the figure "$1+". It is not necessary at this time to fully complete the form.

Taxpayers may also protect the statute by writing a letter to the Tax Commission, giving the following information: 1) Name, 2) Address, 3) Social Security number, 4) year for which they are seeking a refund (in this case, 1985), and 5) state in the letter that a refund is being sought for taxes paid on federal retirement benefits. The letter should be signed by the federal retiree and dated.

No extension of the April 15, 1989, deadline for filing protective claims has been granted.

Taxpayers may choose which one of the two methods is simpler for them. The Tax Commission will hold the amended returns and letters filed as protective claims until further action is necessary. All taxpayers filing a protective claim will be notified by letter of the outcome of this situation once it has been resolved.

Letters and amended returns should be mailed no later than April 15 to SCTC - FRA, P.O. Box 12265, Columbia, SC 29211-2265.

The Tax Commission is currently studying the Supreme Court ruling and conferring with the state legislature on its impact on South Carolina. As changes occur, the Tax Commission will thoroughly advise taxpay-

ers on their rights and obligations towards federal retirement benefits.

Current state law exempts $3,000 of federal retirement benefits for civil service retirees and for military retirees with 20 years of active duty service. Based on statistics from the federal government, there are approximately 65,000 federal retirees living in South Carolina. It is estimated that fully exempting all federal pensions would cost the state approximately $25-$30 million in revenue each year.

Supreme Court, U.S.
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(2)

No. 90-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this case present a substantial federal question?

2. Was the holding of the South Carolina Supreme Court that the refunds be denied also premised upon an alternate and independent state ground?

3. Does the holding of the South Carolina Supreme Court which prospectively applied the decision of this Honorable Court in *Davis v. Michigan Dept. of Treasury*, _____ U.S. _____, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), satisfy the test for such application as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)?

4. Does the amendment to Section 12-47-440 of the South Carolina Code of Laws by Section 12-47-445 deprive the petitioners of any vested rights?

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STATEMENT OF THE CASE

The South Carolina income tax statutes for the years involved, 1985 through 1988, provided a three thousand ($3,000) dollar deduction of retirement income for persons retired from employment or service with the United States Government. The income of a person retired from state service was exempt in its entirety. Such taxation was declared invalid in *Davis v. Michigan Dept. of Treasury*, supra.

The Court's decision was issued on March 28, 1989, and the State thereafter amended its statute for the 1989 and subsequent years. The income of state retirees is now taxed except for the same three thousand ($3,000) dollar deduction provided federal retirees.

The petitioners, retired federal employees or service persons, instituted this action on April 4, 1989, six days after the *Davis* decision to recover the tax paid on their retirement income for the 1985 through the 1988 tax years.[1]

The South Carolina Supreme Court held that the refunds could not issue because the Davis decision was to have prospective application. It further held that notwithstanding the prospective application of *Davis*, the petitioners could not recover the taxes because the payments were voluntary and not made under protest.

MISSTATEMENTS IN THE PETITION

In accordance with the admonishment of Rule 15 of this Honorable Court, the respondents respectfully submit that the petition incorrectly or fails to state the following:

1. That the taxes sought to be recovered were voluntarily paid.

2. That there is no constitutional requirement that voluntarily

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[1] A separate action is pending in the South Carolina courts for the refund of the taxes paid by retired military officers for the tax years 1945 through 1988.

paid taxes be refunded.

3. That the petition incorrectly states that the remedy provided by Sections 12-47-210 and 12-47-220 of the South Carolina Code of Laws to pay the taxes under protest had not been argued or briefed and first appeared in the South Carolina Supreme Court's Opinion of July 31, 1990. (Petitioners' Brief pp. 4 and 19). The respondents, in paragraph 18 of their answer, in part, alleged that:

> "... The plaintiffs were afforded an adequate and complete remedy under Sections 12-47-210 and 12-47-220 and having failed to comply therewith, have forfeited any rights to maintain the action or to recover the taxes." (Tr., p. 17)

The substance of the above quotation was also stated by the Chairman of the South Carolina Tax Commission in his Affidavit in Opposition to the Petitioners' Motion for Summary Judgement and in support of the respondents' Motion. (Tr., p. 57) These statutes and the remedy there provided were also argued in the respondents' written brief and their oral argument below.

Notwithstanding the above, the Court can judicially note the laws of the State and of the United States and obviously can review prior decisions.

4. That the petition incorrectly states that "no state law ground independently supports the decision below." (Petitioners' Brief, p. 4) The decision of the South Carolina Supreme Court succinctly states the independent state law. (Petitioners' Brief, Appendix, pp. 8a and 9a)

5. The petition misstates the principle of law established in *Davis* to be that a state could not tax the federal government. (Petitioners' Brief, p. 12) The new principle of law was that a state could not tax the retirement income of a federal retiree at a greater rate than the income of a state retiree.

6. The petitioners incorrectly allege that the federal government

subsidized the retirement benefits of state employees. (Petitioners' Brief, pp. 14 and 15) The record establishes that the tax being voluntarily paid was expended by the state for public purposes and that the federal retirees benefited from such expenditures. The federal government has in no way subsidized the State Retirement System. The payments were made by the federal retirees and not the federal government. The theory that the federal treasury was somehow depleted because the federal retirees may have filed federal tax returns and claimed a deduction of the state taxes is far reaching and speculative. The federal government, under such speculation, would also share some of the responsibility. It could have denied the deductions on the ground that the tax was not legally due. For the years involved, the state retirees under the petitioners' hypothesis in fact enriched the federal treasury. There was no state income tax on their income and hence no deduction existed for purposes of federal income taxation. By reason of the exemption, the state retirees would have paid a greater federal tax.

7. The petition incorrectly states that a prospective application of *Davis* gives the state a "naked financial incentive to collect [unconstitutional] taxes." (Petitioners' Brief, p. 15) There is no evidence in the record to support this statement. Further, the record establishes (Tr., p. 56) that the unlawful taxation was not known until the *Davis* decision. A presumption that South Carolina will intentionally violate the Constitution and laws of the United States should not be accepted nor entertained.

8. The petitioners incorrectly state that this Court in *McKesson v. Division of Alcoholic Beverages & Tobacco,* 110 S.Ct. 2238 (1990), held that taxpayers "must be afforded a clear and certain postdeprivation remedy." (Petitioners' Brief, p. 18) This Court did not hold as there stated. A remedy to pay under protest such as Sections 12-47-210 and 12-47-220 satisfies all constitutional requirements.

9. That the petition incorrectly states that the signatures of the Chief Justice and Associate Justice of the South Carolina Supreme Court are illegible. (Petitioners' Brief-Appendix, pp. 10(a), 11(a)

and 20(a)) The signatures on the opinions and order of the Court are legible and reflect the signatures of The Honorable George T. Gregory, Chief Justice; The Honorable David W. Harwell, Associate Justice; The Honorable A. Lee Chandler, Associate Justice; The Honorable Ernest A. Finney, Jr., Associate Justice; and The Honorable Jean H. Toal, Associate Justice.

10. The petition infers that the South Carolina Tax Commission incorrectly advised federal retirees that refunds would issue if claims were filed. (Petitioners' Brief, p. 18) Instead, each of the notices published by the Commission advised the retirees that the Tax Commission could not authorize or direct the refunds.

11. That the petition states on page 18 that "the South Carolina Supreme Court had held, as recently as 1987, that 'voluntary' payments of unconstitutional taxes could be recovered through the statutory method chosen by petitioners. *(Multi-Cinema, Ltd. v. South Carolina Tax Commission,* 357 S.E.2d 6 (S.C. 1987.)" The case cited by the petitioners concerned an admissions tax to view x-rated movies, which was a "license tax" under South Carolina law, Section 12-21-2710. The section was held to be unconstitutional.

ARGUMENT I

THE PETITION SHOULD BE DISMISSED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL ISSUE.

The taxes herein sought to be recovered were voluntarily paid. It is settled that there is no constitutional right to recover a tax that is voluntarily paid. [2]

Because there is no constitutional right to recover taxes voluntarily

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[2] This issue with case citation is treated in 84 C.J.S., *Taxation,* Section 635, p.1277, et seq., 72 Am.Jur.2d, *State and Local Taxation,* Section 1080, p. 341, et seq., 48 A.L.R. 1381 and 74 A.L.R. 1301, see also *City of Columbia v. Peurifoy,* 148 S.C. 349, 146 S.E. 93 (1928) and *United States v. New York and Cuba Mail Steamship Company,* 200 U.S. 488, 26 S.Ct. 327 (1906).

paid, there is no substantial federal question here involved.

The only federal issue presented is whether the South Carolina Supreme Court's prospective application of the decision in *Davis v. Michigan Dept. of Treasury*, supra, was correct.

In *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323 (1990) at p. 2331, this Court held that this presented "a federal question." We submit that the South Carolina Supreme Court's prospective application was correct. Assume, however, for purposes of argument that the Court's prospective application was incorrect. The question must then be asked, "where under such circumstances is the substantial federal question?" We submit that there is none. The tax was voluntarily paid for tax years prior to *Davis* and because of such, there is no substantive federal question for this Court to consider. At most, an incorrect prospective application of *Davis* would result in harmless error. The petitioners cannot recover the taxes since they failed to pay the same under protest.

The first question the petition presents is not whether the prospective application of *Davis* was correct. It is what constitutional or federal right do the petitioners have to recover a tax they voluntarily paid. There is none and hence the petition should be denied.

The petitioners, under South Carolina law, Sections 12-47-210 and 12-47-220, had the right to pay the taxes under protest and to recover the same in an action at law.[3] Had the petitioners paid the taxes under protest, neither they nor the state would be faced with the tremendous financial impact this case presents. The state would have had knowledge of the alleged illegal collection and could have escrowed the tax. The tax would not have gone into the general funds of the state and been expended for the benefit of all of the state's citizens, including the petitioners. This remedy was provided

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[3] It is further submitted that these sections satisfy the standard set forth by this Court in *McKesson Corp. v. Divison of Alcoholic Beverages and Tobacco*, supra.

by South Carolina law in each of the more than forty years that the tax was paid. [4]

The petitioners, however, did not pursue this remedy and instead made voluntary payments.[5]

ARGUMENT II

THE PETITION SHOULD BE DISMISSED BECAUSE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS ALSO FOUNDED ON INDEPENDENT STATE LAW.

The South Carolina Supreme Court has by express language held that the petitioners' remedy under South Carolina law was to pay the taxes under protest and institute an action to recover the tax.

> "Even were we to examine state law, the federal retirees would be barred from receiving a refund. The proper refund statutes under which the federal retirees should have proceeded are S.C. Code Ann. Sections 12-47-210 and 12-47-220 (1976), which require the taxpayer to pay under protest before bringing a refund action. We have previously stated that the exclusive remedy for the recovery of the erroneous assessment of income taxes is through these 'pay under protest' statutes. See, *Perpetual Bldg. & Loan Ass'n. of Columbia v. South Carolina Tax Commission*, 255 S.C. 523, 180 S.E.2d 195 (1971)."

This is a clear declaration by the South Carolina Supreme Court that the funds could not be granted under state law, notwithstanding the prospective application of *Davis*. This Court should also deny

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[4] Code provisions prior to the 1976 Code were Section 2469 of the 1942 Code of Laws; Sections 65-2661 and 65-2662 of the 1952 and 1962 Code of Laws.

[5] The South Carolina Supreme Court found as a fact that the taxes herein were voluntarily paid and the Court's finding is amply supported by the record.

the petition herein under its holding in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). It was there held that:

> "... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Under this settled rule, the petition should be dismissed.

ARGUMENT III

THE PETITION SHOULD BE DENIED BECAUSE THE SOUTH CAROLINA SUPREME COURT'S PROSPECTIVE APPLICATION OF *DAVIS* WAS A CORRECT AND PROPER APPLICATION UNDER *CHEVRON OIL CO. V. HUSON*, SUPRA.

In *Chevron*, this Court established a three prong test to determine when its decisions would have prospective application. Each of the three factors is here satisfied.

The First Factor

The South Carolina Supreme Court found, "The *Davis* decision for the first time, held that the doctrine of intergovernmental tax immunity applied to retirement income of a federal employee". *Davis* established a new principle of law and was a case of first impression. Further, it is illogical to argue that *Davis* was a restatement of law that was clearly foreshadowed because of the decisions in *McCulloch v. Maryland*, 4 Wheat 316 [4 L.Ed. 579] (1819); *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938) or *Graves v. New York, ex rel O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). [6] The genesis of the *Davis* holding was not there founded nor was it stated in *Zucker v. United States*,

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[6] *McCulloch* held that the State could not tax property of the federal

758 F.2d 637, cert. denied 474 U.S. 842, 106 S.Ct. 129, 88 L.Ed.2d 105 (1985), *Kizas v. Webster*, 227 U.S. App. D.C. 327, 707 F.2d 524 (1983) cert. denied 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984) or *Clark v. United States*, 691 F.2d 837 (CA7, 1982). None of these cases dealt with the issue of the state taxation of the income of a retired federal employee. In *Zucker v. United States*, supra., the issue involved cost of living increases and whether Congress could amend or modify existing law so as to reduce the increases. In commenting on the question of whether retirement income was deferred compensation, the Court by dictum stated:

> "The legislative history lends some support to the view that the basic annuity was intended as deferred compensation ..." p. 639.

The Court, on page 639, also stated:

> "This Court does not reach the question of the compensatory nature of the basic annuity to which the retiree became entitled upon retirement ..." p. 639.

The Court did say in *Zucker* that there was case law that could be construed to support a concept of deferred compensation (p. 639) and cited *Steinberg v. United States*, 163 F.Supp. 590, 143 Ct.Cl. 1 (1958) as its authority. It is respectfully submitted that the language in *Steinberg* is somewhat conflicting. The Court held:

> "The right of a Federal employee to an annuity is not born of a contractual relationship between the government and the employee, but is more in the nature of a gratuity granted in appreciation for long and faithful service ... Although an annuity is paid for past, as distinguished from present services, the legal relationship between the

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government. *Helvering* and *Graves* treated the taxation of income of employees of the federal and state governments. Taxation of the income of federal retirees was not there considered.

parties is in all material respects parallel ..."

Steinberg concerned the issue of whether Congress could deny the annuity to a person who refused to testify before a grand jury. It did not treat Section 4 U.S.C. 111 or the doctrine of intergovernmental tax immunity.[7]

The second case of *Kizas v. Webster*, supra, related to the Federal Bureau of Investigation's modifications of a policy for appointment to the position of Special Agent. The issue was whether employees had vested property rights under the policy. That decision did not treat the question that is here involved.

The case of *Clark v. United States*, supra, concerned allegations of discrimination because federal retirees received a cost of living adjustment while none was provided to state and private pensioners. It was alleged that this denied equal protection and due process. The Court held otherwise and found no discrimination. Again, we respectfully submit that the Court did not there address the issue of whether 4 U.S.C. 111 applied to retirement benefits.

By reason of the above, there was no reasonable basis on which the respondents could have reasonably contemplated that its taxing statutes abridged the provisions of 4 U.S.C. 111.

The *Davis* decision was thus not clearly foreshadowed.[8] Surely under the facts as here exist, the respondents are not to be held to an exact standard of interpreting existing law when the statute does not upon its face clearly apply to the factual matter involved. Frequently, there are different views and interpretations of the language of statutes when the statutes do not by clear

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[7]A gratuity is a gift and not payment for services rendered. Retirement income cannot be both a gratuity and deferred compensation.

[8]In South Caolina, this tax had been voluntarily paid since 1945, a period of almost 45 years. Neither the retirees in South Carolina nor the State knew or suspected the taxation to be unlawful.

language address the specific issue.[9] There was no clear rule of law prior to *Davis* and hence *Davis* could not have been "clearly foreshadowed." The first prong of *Chevron* was thus satisfied.

The Second Factor

The state promptly eliminated the discriminatory taxation by taxing the retirement income of retired state employees in like manner as the retirement income of federal retirees.

The prior history in South Carolina was the voluntary payment of the tax for almost 45 years. The tax so collected was appropriated each year for the benefit of all of the state's citizens, including the federal retirees. A prospective application of *Davis* can in no way retard its operation. A retrospective application of *Davis* will not further the holding that discrimination in the taxation of retirement income is prohibited. In this case, it would primarily serve to punish the majority of the state's taxpayers by requiring them to fund repayment of taxes that were in good faith and voluntarily paid. The second prong is satisfied.

The Third Factor

The language of the South Carolina Supreme Court correctly addresses this factor. The Court held:

> " ... If Davis is applied retroactively, the State faces liability for approximately $200,000,000.00 in refunds for taxes it collected in good faith under an unchallenged and presumptively valid statute. South Carolina would have to refund this sum for taxes already received which it has already spent for public purposes; many of these benefits

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[9]It should be noted that three different courts in Michigan and His Honor Justice Stevens of this Honorable Court held that the Michigan statute did not offend 4 U.S.C. 111.

> have already been received by federal retirees residing in South Carolina. The refund of such an exorbitant amount would impose a severe financial burden on the State and its citizens as well as endanger the financial integrity of the State."[10]

The record reflects that approximately 62,000 retired federal civil service annuitants and retired military persons filed tax returns with the state. It further reflects that approximately two hundred million ($200,000,000) dollars is involved in the action. The federal retirees represent just under 2% of the state's population.[11]

The refund claims approximate 5.95% of the state's appropriated general funds for the 1988-89 fiscal year.[12] It would be inequitable to apply *Davis* retrospectively and to require the refund of this large sum that was voluntarily paid at the expense of the vast majority of the state's population. If the refunds are to issue, it is obvious that the current level of services provided to all the state citizens, including the retirees, would of necessity have to be reduced or added taxes levied. In these claims, it is not Mr. Davis, the person initially contesting the tax, who prosecutes this action. Instead, the claimants are those persons who for a long period of time voluntarily paid the tax and received whatever benefits flowed from the tax payments in the form of public expenditures for public purposes. Those persons seek the refund of the tax at the expense of the State Treasury, which obviously is funded by the state's taxpayers. This inequitable result to all the state's taxpayers is avoided by the prospective application of the *Davis* decision.

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[10]An action to recover a tax is an action at law nonetheless the same is governed by equitable principles. *Stone v. White*, 57 S.Ct. 851, 301 U.S. 532, 81 L.Ed. 1265 (1937).

[11]The 1980 census listed the State's population at $3,121,820.

[12]The State's appropriated general funds for the 1989-90 fiscal year were $3,363,385,451. Act 189, Acts of 1989, Section 127, Recapitulation.

The reasoning of the Court in prospectively applying the decision in *Arizona Governing Committee, etc. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983), is equally applicable to this case. The Court there held that the retirement program of the State of Arizona discriminated against female retirees. Retrospective application of the decision, however, was denied because of the adverse results such an application would create. In other words, the adverse effect to the state and its taxpayers outweighed any disadvantage to the retirees. This would be the circumstance in South Carolina should the *Davis* decision be retrospectively applied and the State be required to refund the two hundred million ($200,000,000) dollars.

The equity here involved warrants prospective application and the third prong is thus met.

ARGUMENT IV

THE AMENDMENT TO SECTION 12-47-440 BY SECTION 12-47-445 DOES NOT DEPRIVE THE PETITIONERS OF ANY VESTED RIGHTS.

The South Carolina Supreme Court did not directly address this issue, however, the petitioners argue that the amendments to Section 12-47-440 by Section 12-47-445 of the South Carolina Code of Laws denied them vested rights. Section 12-47-445 limited the right to claim and sue for the refund under Section 12-47-440 to nonconstitutional or nonlegal errors. This the petitioners contend deprives them of a vested constitutional right. The petitioners, however, have no vested rights in the continuation of a law that provides for the refund of a tax that is voluntarily paid.[13] The general

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[13] In South Carolina, a statute that provides a remedy to contest a tax that is involuntarily paid or paid under protest stands on a different footing than a statute for the recovery of taxes that were voluntarily paid. *Duke Power Co. v. South Carolina Tax Commission*, 81 F.2d 513 (1936).

rule is stated in 73 Am.Jur.2d, *Statutes*, Section 389, as follows:

> "Under the common law, if a statute is unconditionally repealed without a saving clause in favor of pending suits, all pending proceedings thereunder are terminated. This is true of the repeal of a law relating to procedure, or of a law conferring jurisdiction, in which case the right to proceed further in an action that is pending but undetermined at the time of the repeal is taken away. Moreover, in the absence of any constitutional saving clause, a judgment rendered by virtue of the terms of a statute which is repealed is void, although the proceedings may have been commenced before the repeal ..."

In *South Carolina v. Gaillard*, 101 U.S. 433, 25 L.Ed. 937 (1879), this Court followed this rule and held:

> "... it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after ..."

In a later case, *Bruner v. United States*, 343 U.S. 112, 72 S.Ct. 581, 96 L.Ed. 786 (1952), the Court favorably quotes from *Merchants' Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L.Ed. 540 (1867), as follows:

> "It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction."

Certiorari was denied by this Court in two cases wherein the issue was the right of a state to repeal a statute that provided for the refund of taxes. *Southern Service Company v. Los Angeles*, 97 P.2d 963, 15 Cal.2d. 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 61, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421,

and *Sears Roebuck & Co. v. Lundheimer*, 371 Ill. 367, 21 N.E.2d 318, 124 A.L.R. 1472, appeal dismissed 60 S.Ct. 112, 308 U.S. 505, 84 L.Ed. 432, rehearing denied 60 S.Ct. 137, 308 U.S. 636, 84 L.Ed. 529.

The California and Illinois Courts held, inter alia, that a person had no vested rights in the continuation of a statute for the recovery of a tax. Here the petitioners voluntarily paid the taxes and hence have no vested rights to recover the tax.

> "It is firmly established that there is no vested right in any particular mode of procedure or remedy, and it is a general rule that where a statute giving a particular remedy is unqualifiedly repealed, the remedy is abrogated. Indeed, where a statute giving a special remedy is repealed by a later act which substitutes nothing in its place, the effect is to obliterate such statute as completely as if it had never been passed." 73 Am.Jur.2d, *Statutes*, Section 388. (See also 16A Am.Jur.2d, *Constitutional Law*, Section 671.)

The same authority in Section 672 at page 657 states the rule as follows:

> "A statutory right of action, whether based on a state or federal statute, may be taken away after it has accrued or is being enforced, and if the repealing statute contains no saving clause the rights are lost to the holders. The right to abolish a cause of action has, in some cases, been based upon the fact that the particular cause of action does not exist at common law. The justification for this rule is that statutory causes are pursued with the full realization that the legislature may abolish the right to recover at any time."

A waiver of the state's immunity to suit must be strictly construed. *United States v. Michel*, 282 U.S. 656, 51 S.Ct. 584 (1931), *Bomar v. Spartanburg*, 181 S.C. 453, 187 S.E. 921 (1936), *United States v. Livingston*, 179 F.Supp. 9 (1959) affd. 364 U.S.

855, 80 S.Ct. 1611, 42 L.Ed.2d 1719 (1960).

The petitioners have thus not been deprived of a vested right and hence the petitioners' argument is without merit.

CONCLUSION

The petition should be denied because there is (a) no substantial federal question involved, (b) the refunds cannot issue under separate and independent state grounds (c) the South Carolina Supreme Court's prospective application of the *Davis* decision was correct, and (d) the amendment to Section 12-47-440 by Section 12-47-445 does not deprive the petitioners of any constitutional rights.

Respectfully submitted,

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November 19, 1990

APPENDICES

APPENDIX A

Section 12-47-210

When the State or any county charges or levies any tax whatsoever against any person upon the books of any county treasurer of the State or any tax is assessed by the Commission and such treasurer or Commission shall claim the payment of the taxes so charged or assessed, or shall take any step or proceeding to collect them, the person against whom such taxes are charged or assessed or against whom such step or proceeding shall be taken, or the then owner of the legal title to property affected by such tax or a mortgagee holding a lien thereon, may, if he conceives such taxes to be unjust or illegal for any cause, pay such taxes, and any penalties thereon, under protest in writing in such funds and moneys as the county treasurer or Commission shall be authorized to receive. Upon such payment being made, the Commission shall pay the taxes and penalties so collected by it into the State Treasury giving notice at the time to the State Treasurer that the payment was made under protest. The county treasurer shall retain all taxes and penalties collected by him. The full faith and credit of the county is pledged as security for such funds.

APPENDIX B

Section 12-47-220

Any person paying any taxes under protest may at any time within thirty days after making such payment, but not afterwards, bring an action against the county treasurer or the Commission, as the case may be, for the recovery thereof, in the case of a county treasurer in the court of common pleas for the county in which such taxes were payable and in the case of the Commission in any county having jurisdiction, and, if it be determined in such action that such taxes and penalties, if any, were wrongfully or illegally collected for any reason going to the merits, the court before whom the case is tried shall certify of record that such taxes were wrongfully collected and ought to be refunded and thereupon the county treasurer shall refund the taxes and penalties, if any, so paid to him or, in the case of any taxes levied or assessed by the Commission shall issue its order to the State Treasurer to refund such taxes and penalties, if any, so paid, which shall be paid in preference to other claims against the State Treasury.

APPENDIX C

Section 12-47-440

Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extension of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid. Such action shall be brought in the court of common pleas for Richland County except that a resident of this State may elect to bring said action in the court of common pleas for the county of his residence. A taxpayer or licensee who brings an action provided for in Sections 12-47-210 and 12-47-220 shall be considered as having elected his remedy and is denied the benefits of this section.

APPENDIX D

Section 12-47-445

The provisions of Section 12-47-440 do not apply to claims for abatement or refund resulting from a decision of a court of competent jurisdiction declaring a tax law of this State unconstitutional or otherwise unlawful. For purposes of this section, a final decision is the decision of a court declaring the law unconstitutional or otherwise unlawful and from which the appropriate officials of this State cannot or do not take an appeal or request a rehearing.

NOV 21 1990

No. 90-673

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,
v.
STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE WISCONSIN STATE FEDERATION OF CHAPTERS OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Petitioners have consented to the filing of the brief. The consent of the Respondents was requested but refused.

INTEREST OF *AMICUS*

Amicus is the Wisconsin State Federation of Chapters of the National Association of Retired Federal Employees ("NARFE"). NARFE is a nonprofit, incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership now ex-

ceeding half a million federal annuitants (retirees and survivors) living throughout the fifty states, Puerto Rico, and the Canal Zone, the Republic of the Philippines, and various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

NARFE has concerned itself with issues affecting the aged and aging, and in particular those issues that affect federal annuitants. NARFE's goal is to identify issues of particular importance to federal annuitants, to inform them, through its Newsletter and the state and local chapter network, of these issues, and to act upon these issues to further the members' common goals. NARFE also assists federal annuitants in obtaining benefits to which they may be entitled under the retirement laws by interacting with various federal agencies and private entities on such matters as federal annuities and health and life insurance benefits. The Wisconsin State Federation of Chapters is involved with implementing NARFE's policies in the State of Wisconsin and coordinating local activities.

The State of South Carolina and at least twenty-two other states taxed the federal retirement benefits of federal annuitants while exempting from state taxation the retirement benefits of state annuitants. This disparate tax treatment is in violation of 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity.

The question presented in this case—whether the refunds of state income tax imposed in violation of 4 U.S.C. § 111 may be denied through a prospective-only application of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989)—is vitally important to *amicus*. If a prospective-only application of *Davis* is ap-

plied, these federal annuitants will suffer economic harm. Thus, *amicus* has a compelling and vital interest in the proper resolution of the question presented. Accordingly, *amicus* respectfuly moves for leave to file the attached brief *amicus curiae* in support of the Petitioners.

Respectfully submitted,

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QUESTION PRESENTED

Whether the refunds of state income tax imposed in violation of 4 U.S.C. § 111 may be denied through a prospective application of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989)?

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE WISCONSIN STATE FEDERATION OF CHAPTERS OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus* is set forth in the motion accompanying this brief.

STATEMENT

This case raises important questions regarding the propriety of states retaining taxes imposed and collected from its citizens in violation of the Constitution of the United States and 4 U.S.C. § 111. It involves whether state courts have the authority to decree that a decision of this Court striking down state taxes on constitutional grounds may be applied prospectively only. In particular, this case involves whether this Court's decision in

Davis v. Michigan Department of Treasury, 489 U.S. 803, 109 S. Ct. 1500 (1989), may be applied in a prospective only fashion so as to deny tax refunds to federal retirees.

In *Davis*, this Court held that 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity prohibited the State of Michigan from taxing federal retirees more harshly than state retirees. Like Michigan, the State of South Carolina, and approximately 20 other states, exempted state annuities of retired state and local employees from state income taxation while taxing the annuities of retired federal employees.

In the wake of *Davis*, the petitioners submitted amended state income tax returns for tax years 1985 through 1988 seeking refunds of all taxes paid on that portion of their income consisting of federal retirement income as a result of South Carolina's discriminatory taxing scheme. The South Carolina Tax Commission denied all *Davis*-related refund claims.

Petitioners filed suit in Horry County Court of Common Pleas seeking refunds for taxes collected in violation of 4 U.S.C. § 111 and the constitutional doctrine of intergovernmetnal tax immunity. On June 8, 1989, the South Carolina legislature enacted legislation, effective immediately, which purported to divest petitioners of their right under state refund laws to obtain refunds. S.C.Stat.Ann. § 12-47-445.

The trial court ruled in favor of the petitioners, holding that they were entitled to refunds pursuant to South Carolina statutory and decisional law. The trial court also found that the new state law which purported to divest petitioners of their refund right had no effect on the refunds sought by the petitioners since the taxes in question all predated the newly enacted legislation.

The State appealed the trial court's decision. The Supreme Court of South Carolina reversed the trial court's

decision, finding that the *Davis* decision applied prospectively only. On petitioners' petition for rehearing, and subsequent to this Court's decisions in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990) and *American Trucking Ass'n v. Smith*, 110 S. Ct. 2323 (1990), the court amended its prior decision, suggesting that petitioners had not satisfied state tax refund requirements because the taxes paid by the federal annuitants were not paid "under protest". Despite this reference to state law, the court expressly noted that its decision was based on its finding that *Davis* should not be applied retrospectively and, therefore, no analysis of state law was required. In any event, the issue of whether the petitioners were required to file under protest had not been argued, briefed or decided at the trial court and had not been properly raised on appeal pursuant to South Carolina appellate practice. Thus, no state law ground independently supports the decision below.

SUMMARY OF THE ARGUMENT

Amicus asks that this Court grant certiorari to reverse the decision of the Supreme Court of South Carolina. In the decision below, the court, motivated by uniquely parochial interests, substituted its judgment for that of Congress. The decision is irreconcilable with this Court's decisions in *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *Claflin v. Houseman*, 93 U.S. 130 (1876). A state court simply does not have the power under the guise of the prospectivity doctrine to change the effective date of a congressional enactment.

In the decision below, the Supreme Court of South Carolina relied on its view of the prospectivity doctrine. Assuming that this Court is persuaded that it should apply the plurality test of *American Trucking Ass'n v. Smith*, 110 S. Ct. 2323 (1990), and assuming further that the threshold test for prospectivity is somehow deemed satisfied, this Court should determine the appro-

priate parameters of inquiry necessary to sustain a determination of prospectivity under prongs two and three. The court below summarily concluded that because the offending statute had been repealed prospectively, the second prong had been satisfied. With respect to the third prong, the court's consideration addressed only the fiscal impact to the State. In contrast to the summary consideration of the court, a meaningful inquiry under prongs two and three would have established that a failure to apply *Davis* retroactively, in fact, frustrates the operation of the rule. This Court should take the opportunity to frame the duty of a court to engage in a meaningful inquiry under prongs two and three of the prospectivity test. This is particularly so in a case where the interests of the United States and individuals are at issue. It is believed that a proper analysis requires the consideration of factors both different in degree and kind than those previously considered in the context of the dormant Commerce Clause.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), this Court observed that when a tax is "beyond the State's power to impose" then the State has "no choice but to 'undo' the unlawful deprivation by refunding the tax . . . ." *Id.* at 2251. Prior decisions of this Court indicate that discriminatory state tax schemes which violate the doctrine of intergovernmental immunity are beyond a State's power to impose. *See Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 370 (1960); *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961). In a case such as this, a retroactive imposition of a higher state tax on state retirees would not undo the injury to the federal fisc. *Amicus* respectfully requests that this Court address the remedial issues in a case such as this and hold that the discrimination may only be undone by a refund of the unlawful tax.

In view of the fact that this case has produced a conflict between the highest courts of at least two states and

in view of the risk that the decision, if allowed to stand, will be followed in other states, review by this Court is necessary to resolve this conflict which involves a fundamental issue of federalism.[1] If there be any doubt as to the need for certiorari, *amicus* requests that the Court seek the views of the Solicitor General of the United States because of the important federal interest implicated in the decision below.

ARGUMENT

I. A STATE COURT DOES NOT HAVE THE POWER TO CHANGE THE EFFECTIVE DATE OF A CONGRESSIONAL ENACTMENT

In *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are subject to § 111." *Id.*, 109 S. Ct. at 1504. However, in the decision below, the Supreme Court of South Carolina, motivated solely by parochial concerns and ostensibly relying on its views of the prospectivity doctrine, apparently believed that it had the unfettered power to change the effective date of this unambiguous federal statute. The practical consequence of its decision, if permitted to stand, is that 4 U.S.C. § 111 is effective for all tax years after *1988* in South Carolina, whereas the statute has been effective throughout the

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[1] Prior to the filing of this petition, Attorneys General of several states, in an unprecedented, concerted effort over the course of last term and this term, have attempted to preordain the outcome of this case by repeatedly addressing this issue, inappropriately, in the context of the Commerce Clause. *See, e.g.*, Amicus Curiae Brief of the States of Virginia, Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont and Wisconsin filed in *James B. Beam Distilling Co. v. Georgia*, U.S. No. 89-680. Given this extraordinary effort, they should not be heard to complain that this Court will take the case now that it is properly before the Court.

rest of the country since January 1, 1939. *See* Public Salary Tax Act of 1939, Ch. 59, § 4. (App. A at 1a).

Within the last two weeks, a trial court in the state of Oregon has been persuaded to ignore clearly established state refund statutes and long-standing administrative refund practices and has ruled, in reliance upon the decision below, that for years prior to 1989 the discriminatory scheme was not "unconstitutional." *See Ragsdale v. Department of Revenue*, No. 2958 (Oregon Tax Court, Nov. 7, 1990). In addition, in virtually all of the states where *Davis* related litigation is not yet final, trial and appellate courts are being urged to adopt the decision below as dispositive constitutional law.[2]

The position urged by the defendants below and adopted by the Supreme Court of South Carolina is unprecedented. In fact, it is fundamentally inconsistent with settled notions of federalism and state courts' obligations under the Supremacy Clause. Moreover, given the hysteria created by the exaggerated claims of the fiscal burden advanced by the Attorneys General of several states, there is a real risk that the jurisprudence of several states will be infected by the adoption of this decision.

The decision below is irreconcilable with this Court's landmark decision of *McCulloch v. Maryland*, 4 Wheat. 316 (1819). The Supreme Court of South Carolina, no matter how honorable its motives, did not have the "power" to substitute its determination for that of Congress:

> [T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.

Id. at 436.

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[2] *See, e.g.*, State defendants' brief in *Hogan v. Musolf*, —— Wis. 2d ——, 459 N.W.2d 865 (Ct. App. 1990), *appeal docketed*, No. 89-1175 (Sept. 18, 1990).

As recently as last term, a unanimous Court reaffirmed this principle in the context of 42 U.S.C. § 1983, noting that:

> The policy of the Federal Act was to be considered "the prevailing policy in every state" which the state court could not refuse to enforce " 'because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.' "

Howlett v. Rose, 110 S. Ct. 2430, 2442 (1990) (citations omitted).

Indeed, if the decision below were to stand, the resulting anomaly in the law would be breathtaking. In *Fleming v. Fleming*, 264 U.S. 29 (1924), this Court ruled with respect to a state court's construction of a state statute that:

> The effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power by change in construction to date its passage as a law from the time of the latter decisions.

Id. at 31-32. Under this settled view, the Supreme Court of South Carolina would be powerless to change the effective dates of legislation of its own legislature, but yet, motivated by uniquely parochial interests, would have the power, within South Carolina, to change the effective dates of legislation passed by Congress. However, as this Court has repeatedly ruled:

> The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.

Claflin v. Houseman, 93 U.S. 130, 136 (1876).

In a context perfectly analogous to the issues presented here, this Court has previously noted that it does not

possess the power which the Supreme Court of South Carolina exercised below. In *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983), this Court invalidated a Hawaii statute that imposed a tax on gross income of airlines operating within the State because it had been pre-empted by Congress.[3] In so holding, this Court noted that it was bound by the determination of Congress:

> We acknowledge that our interpretation of § 1513(a) may result in the disruption of state systems of taxation; we are, however *bound* by the plain language of the statute.

Id. at 14 n.10 (emphasis added).[4]

Amicus respectfully submits that the important issue of federalism decided by the court below presents a significant danger, the impact of which transcends the interests of federal retirees of South Carolina and the hundreds of thousands of federal retirees whose rights under *Davis* are currently the subject of ongoing litigation in approximately 19 states. The reaction of the states to the carefully articulated retroactivity decisions of last

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[3] Prior pronouncements of this Court in the context of legislation involving a Congressional waiver of intergovernmental tax immunity indicate that, absent a religious adherence to the requirements of such legislation, state tax enactments will be invalidated. *See, e.g., Chase Manhattan Bank v. Finance Administration*, 440 U.S. 447 (1979).

[4] *See also Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 312 (1924) ("The case, as the evidence shows, is one of peculiar and distressing hardship, and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences."); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 346 (1935) ("Our duty, like that of the court below, is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by prediction for or against the policy disclosed in the legislation.").

term, albeit divergent, has not been to recognize that prospectivity is the carefully limited exception, but instead has been to urge that these decisions provide an unqualified license which allows a state court to avoid any obligation, based solely on an untested (and perhaps inflated) estimate of the cost of compliance. The real danger that this case presents is that it will be readily extended by South Carolina and other states to limit states' obligations to comply with Congressional enactments involving the general welfare. Consistent with the command of the Supremacy Clause and *McCulloch v. Maryland*, *supra*, a grant of the petition for writ of certiorari in this case will permit this Court to resolve the uncertainty created in the law of the several states as the result of the decision below.

II. ASSUMING THIS COURT DETERMINES THAT THE PLURALITY APPROACH OF *AMERICAN TRUCKING ASS'N* MAY BE APPLIED IN DETERMINING THE EFFECTIVE DATE OF A CONGRESSIONAL ENACTMENT, A DETERMINATION OF PROSPECTIVITY MAY ONLY BE UPHELD UPON A MEANINGFUL ANALYSIS OF THE SECOND AND THIRD PRONGS OF *CHEVRON*

The plurality observed in *American Trucking Ass'n v. Smith*, 110 S. Ct. 2323 (1990), that the "policy concerns involved" in a decision delineating the scope of liability under a federal statute "are quite distinct" and provide little guidance for determining the fairest way to apply the Court's decisions in the context of the dormant Commerce Clause doctrine. *Amicus* respectfully submits that the application of the prospectivity test reflected in the plurality decision of *American Trucking Ass'n* is particularly inappropriate to a case such as this where Congress has made the express policy decision as to the statute's effective date. However, assuming this Court is persuaded that it should apply the *American Trucking Ass'n* plurality test, and assuming further that the thres-

hold test is somehow deemed satisfied, this Court should determine the appropriate parameters for prongs two and three of that test when applied in the context of a state personal income tax where the interests of the United States, as well as elderly citizens, are implicated.[5]

Setting aside the issue of whether the first prong was correctly determined, the court below summarily concluded that, because the statute at issue was repealed prospectively, this prong had been satisfied. (Pet. App. 7a). This summary observation can hardly be deemed adequate.

This Court should take the opportunity to frame the duty of a court to engage in a meaningful inquiry under this prong. Had such an inquiry been undertaken in this case, the court below would have been forced to conclude that the purpose of the rule could be furthered only by retrospective operation. The court's failure to apply *Davis* retroactively, in fact, frustrates the operation of the rule.

For forty-three years, South Carolina reduced its employment costs at the expense of the federal treasury. *See Davis*, 109 S. Ct. at 1507-08 n.4. In addition, during that same period of time, it misappropriated substantial

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[5] As cogently pointed out in the petition in this case, the determination of the Supreme Court of South Carolina on the first prong appears to be nothing more than a bald conclusion. A review of this Court's opinion in *Davis v. Michigan* indicates quite clearly that the party who sought to overrule "clear past precedent" was not the taxpayer but the Michigan Department of the Treasury. *Davis*, 109 S. Ct. at 1507. In addition, under this Court's reasoning in *Ashland Oil Co. v. Caryl*, 110 S. Ct. 3202 (1990) and *National Mines Corp. v. Caryl*, 110 S. Ct. 3205 (1990), it also appears that even if *Davis* is subject to the prospectivity test, it still should be applied retroactively. *See South Carolina v. Baker*, 485 U.S. 505, 520 n.10 (1988) (The law has always been that Congress has the power to enact statutes immunizing those with whom it deals from state taxation even if the doctrine would not otherwise confer immunity.).

federal revenues by virtue of the discriminatory tax imposed upon federal retirees. These state exactions were deducted by numerous federal retirees under 26 U.S.C. § 164, directly reducing federal income tax collections for each of those years. (App. B at 6a). Refunds of these taxes now will enable the federal government to recover part of the federal revenues misappropriated by South Carolina in past years. Under the Tax Benefit Doctrine and section 111 of the Internal Revenue Code, any refund ordered will be subject to federal tax in the year received. *Id.* Consequently, the refusal of the Supreme Court of South Carolina to order refunds has actually resulted in a new violation of 4 U.S.C. § 111.

With respect to the third prong, the court's analysis is almost nonexistent. (*See* Pet. App. 8a). Its analysis consisted solely of the alleged financial burden upon the state. The relevant equities are far broader in this case and generally, in the context of a personal income tax case, should differ significantly from those weighed under a Commerce Clause challenge.

First, the court below made no effort to quantify the windfall that South Carolina received during the forty-three years this unlawful scheme was in effect.[6] Common sense suggests that the amount of taxes exacted for years before 1985 exceeds by several times any present refund obligation. Second, South Carolina did not hesitate to accept that part of the Public Salary Tax Act of 1939 which benefitted its parochial interests. Under Title II of the Act, South Carolina's retirees, as well as its then current employees, enjoyed total immunity from the fed-

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[6] Indeed, it is surprising that the state of South Carolina even urged that the equities favored no relief. For its size and contribution to the federal fisc, South Carolina's economy for years has been the beneficiary of a generous federal government. Recent statistical data reflect that in fiscal year 1989, the Department of Defense, alone, spent almost $3.2 billion in the state. *See* Department of Defense ATLAS/DATA ABSTRACT FOR THE UNITED STATES AND SELECTED AREAS—FY 1989. (App. C at 9a).

eral income tax for all years prior to 1939. *See* Public Salary Tax Act of 1939, Ch. 59, Title II. (App. A at 2a). Having accepted the benefits of the Act, equity compels that South Carolina now accept its burden.

Most significantly, the court failed to analyze the equities and reliance interests of its federal retirees, many of whom are elderly. Unlike *American Trucking Ass'n* and *McKesson*, the taxpayers here are not sophisticated multi-state business enterprises. They are average, law-abiding citizens who complied with the mandates of the South Carolina law in reliance on their assumption that the State of South Carolina is an honorable government. For purposes of weighing the equities, they should not now be penalized by South Carolina for complying with its laws. Moreover, it is totally inappropriate for a court to penalize an elderly citizen because the citizen could not afford to challenge that which the State should have known was, at best, suspect.[7] Moreover, with respect to South Carolina's tax collections after this Court's announcement of *Davis*, the record establishes that there

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[7] As noted in the now final decision of Judge Hererra in the *Davis*-related case of *Burns v. Shaw*, No. 89-1314(c) (Santa Fe County, N.M., Apr. 5, 1990):

> [T]he State . . . argues that the decision in *Davis* was not foreshadowed because it has gone unchallenged. Such an analysis begs the question. The State . . . cannot sit by and wait until a law is challenged without an independent analysis of whether or not it is legal. What rationale did the State have for treating Federal retirees and State retirees differently? . . . The operative question should not be whether the statutory scheme was challenged, relying on actions by some unidentified parties, but whether it was reasonable for the State . . . to assume that it was constitutionly [sic] permissible to treat State retirees differently from Federal retirees. Such a distinction defies logic and could have been anticipated by the State . . . even without intervention from the United States Supreme Court. An *objective* analysis would have led the State . . . to conclude that the distinction was suspect and incorrect.

Id., slip op. at 4 (emphasis added).

are no equities which would justify the retention of these taxes. (Pet. App. 30a-35a).

The Supreme Court of South Carolina's analysis of the equities also manifests a lack of understanding of the uniqueness of the personal income tax. Most states have long since adopted the federal standard of equity and conscience which favors the taxpayer.[8] This standard has its genesis in several of this Court's decisions involving federal taxation. As noted in *Moore Ice Crean Co. v. Rose*, 289 U.S. 373 (1933), "[a] high-minded government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience." *Id.* at 379. This standard expressly rejects such "ignoble" concepts as payment under protest, the power of the sovereign to retain invalid exactions, and the power to qualify the refund right by prospective decisions. Moreover, the federal refund right is conditioned or limited *solely* by the statute of limitations. In *Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947), this Court said:

> [W]e read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

Id. at 531. This standard is based on sound considerations of public policy and seeks as its end to promote compliance with the income tax system.[9]

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[8] *See, e.g., Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989) (banc), *cert. denied*, 110 S. Ct. 718 (1990); New York Tax Law, §§ 687(a) and 607(a) (McKinney's 1986 & Supp. 1990) (App. D at 10a).

[9] *See* REPORT AND RECOMMENDATIONS ON TAXPAYER COMPLIANCE, American Bar Association Commission on Taxpayer Compliance, July, 1989, 41 Tax Lawyer 329, 353 (1988) ("Strict and unreason-

Refunds in cases such as this one would actually be in the best interest of the state because they would restore taxpayer confidence in the integrity and fairness of the personal income tax of South Carolina and the courts which are called upon to cure the abuses of those who are entrusted to enforce it. It is now a matter of common knowledge that honest citizens have less confidence in the fairness of the system and have been subject to widespread abuse by state tax collectors. This problem has become so significant that the organized bar has called for immediate reform by each of the states in light of its findings that:

> For many years taxpayers have objected to perceived unfair and arbitrary treatment in compliance, assessment, and appeals of state and local taxes. When taxpayers perceive such treatment, voluntary compliance is seriously threatened. Addressing these concerns should increase respect for the tax system and improve the level of voluntary compliance.

Section of Taxation REPORT TO HOUSE OF DELEGATES, August, 1990 at 2. (App. E at 12a.) If South Carolina is permitted to breach its obligation to its citizens to pay refunds, all citizens of South Carolina will ultimately pay a higher price as the result of increasing noncompliance.

This Court should take the opportunity in this case to frame the scope of the inquiry necessary to sustain a finding of prospective application only. At a minimum, such an inquiry should require an affirmative showing of the taxing authority that, under its settled practice in the context of the particular tax involved, its conduct in denying a refund has been manifestly reasonable.

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able enforcement can, in fact, contribute to undermining the policy goals which the rules are designed to enforce.").

III. A RETROACTIVE REFUND IS THE ONLY APPROPRIATE REMEDY FOR A DISCRIMINATORY STATE TAX WHICH VIOLATES A FEDERAL STATUTE INCORPORATING THE INTERGOVERNMENTAL IMMUNITY DOCTRINE

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), this Court observed that when a tax is "beyond the State's power to impose" then the state has "no choice but to 'undo' the unlawful deprivation by refunding the tax . . . ." *Id.* at 2251. In contrast to the apparent distinction noted in *McKesson* with respect to discriminatory taxes under the Commerce Clause, prior decisions of this Court indicate that discriminatory state tax schemes which violate the doctrine of intergovernmental immunity are beyond a state's power to impose. In *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 370 (1960), this Court held that such taxes "may not be exacted." *Id.* at 387. In *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), this Court held that the tax was "void." *Id.* at 752.

This Court has not yet had the opportunity to address the remedial issues in a case such as this, where the tax violates the intergovernmental tax immunity doctrine and 4 U.S.C. § 111. As noted above, a retroactive imposition of a higher state tax on state retirees would not undo the injury to the federal fisc. In fact, it would compound the injury of the United States by decreasing future federal tax collections as the result of increased itemized deductions for the retroactive state tax. *See* 26 U.S.C. § 164. (App. B at 6a.) This, in turn, would provide the state with a second windfall for having violated 4 U.S.C. § 111. *See Davis*, 109 S. Ct. at 1507 n.4. *Amicus* respectfully requests that this Court resolve this remedial issue in this case and hold that the discrimination may only be undone by a refund of the unlawful tax.

CONCLUSION

The decision below appears to use a strained, if not, an incorrect prospectivity analysis as a pretext to disguise the court's conscious disregard for settled constitutional rights. *Amicus* respectfully submits that the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

PUBLIC SALARY TAX ACT OF 1939

AN ACT

Relating to the taxation of the compensation of public officers and employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Salary Tax Act of 1939".

TITLE I

SECTION 1. Section 22 (a) of the Internal Revenue Code (relating to the definition of "gross income") is amended by inserting after the words "compensation for personal service" the following: ("including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing)".

SEC. 2. Section 116 (b) of the Internal Revenue Code (exempting compensation of teachers in Alaska and Hawaii from income tax) is repealed.

SEC. 3. Section 22 (a) of the Internal Revenue Code is amended by adding at the end thereof a new sentence to read as follows: "In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income".

SEC. 4. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession of political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction

to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

TITLE II

SEC. 201. Any amount of income tax (including interest, additions-to-tax, and additional amounts) for any taxable year beginning prior to January 1, 1938, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing—

(a) shall not be assessed, and no proceeding in court for the collection thereof shall be begun or prosecuted (unless pursuant to an essessment made prior to January 1, 1939);

(b) if assessed after December 31, 1938, the assessment shall be abated, and any amount collected in pursuance of such assessment shall be credited or refunded in the same manner as in the case of an income tax erroneously collected; and

(c) shall, if collected on or before the date of the enactment of this Act, be credited or refunded in the same manner as in the case of an income tax erroneously collected, in the following cases—

(1) Where a claim for refund of such amount was filed before January 19, 1939, and was not disallowed on or before the date of the enactment of this Act;

(2) Where such claim was so filed but has been disallowed and the time for beginning suit with respect thereto has not expired on the date of the enactment of this Act;

(3) Where a suit for the recovery of such amount is pending on the date of the enactment of this Act; and

(4) Where a petition to the Board of Tax Appeals has been filed with respect to such amount and the Board's decision has not become final before the date of the enactment of this Act.

SEC. 202. In the case of any taxable year beginning after December 31, 1937, and before January 1, 1939, compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall not be included in the gross income of any individual under Title I of the Revenue Act of 1938 and shall be exempt from taxation under such title, if such individual either—

(a) did not include in his return for a taxable year beginning after December 31, 1936, and before January 1, 1938, any amount as compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing; or

(b) did include any such amount in such return, but is entitled under section 201 of this Act to have the tax attributable thereto credited or refunded.

SEC. 203. Any amount of income tax (including interest, additions to tax, and additional amounts) collected on, before, or after the date of the enactment of this Act for any taxable year beginning prior to January 1, 1939, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall be credited or refunded in the same manner as in the case of an income tax erroneously collected, if claim for refund with respect thereto is filed after January 18, 1939, and the Commissioner of Internal Revenue, under regulations prescribed by him with the approval of the Secretary of the Treasury, finds that disallowance of

such claim would result in the application of the doctrines in the cases of Helvering against Therrell (303 U.S. 218), Helvering against Gerhardt (304 U. S. 405), and Graves et al. against New York ex rel O'Keefe, decided March 27, 1939, extending the classes of officers and employees subject to Federal taxation.

SEC. 204. Neither section 201 nor section 203 shall apply in any case where the claim for refund, or the institution of the suit, or the filing of the petition with the Board, was, at the time filed or begun, barred by the statute of limitations properly applicable thereto.

SEC. 205. Compensation shall not be considered as compensation within the meaning of sections 201, 202, and 203 to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

SEC. 206. The terms used in this Act shall have the same meaning as when used in Chapter 1 of the Internal Revenue Code.

SEC. 207. No collection of any tax (including interest, additions to tax, and penalties) imposed by any State, Territory, possession, or local taxing authority on the compensation, received before January 1, 1939, for personal service as an officer or employee of the United States or any agency or instrumentality thereof which is exempt from Federal income taxation and, if a corporate agency or instrumentality, is one (a) a majority of the stock of which is owned by or on behalf of the United States, or (b) the power to appoint or select a majority of the board of directors of which is exercisable by or on behalf of the United States, shall be made after the date of the enactment of this Act.

SEC. 208. This title shall not apply with respect to any officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, after the Secretary of the Treas-

ury has determined and proclaimed that it is the policy of such State to collect from any individual any tax, interest, additions to tax, or penalties, on account of compensation received by such individual prior to January 1, 1939, for personal service as an officer or employee of the United States or any agency or instrumentality thereof. In making such determination the Secretary of the Treasury shall disregard the taxation of officers and employees of any corporate agency or instrumentality which is not exempt from Federal income taxation, or which if so exempt is one (a) a majority of the stock of which is not owned by or on behalf of the United States and (b) the power to appoint or select a majority of the board of directors of which is not exercisable by or on behalf of the United States.

SEC. 209. In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act.

SEC. 210. For the purposes of this Act, the term "officer or employee" includes a member of a legislative body and a judge or officer of a court.

SEC. 211. If either title of this Act, or the application thereof to any person or circumstances, is held invalid, the other title of the Act shall not be affected thereby.

Approved, April 12, 1939.

APPENDIX B

EXCERPTS FROM THE INTERNAL REVENUE CODE

[Sec. 111]

SEC. 111. RECOVERY OF TAX BENEFIT ITEMS.

[Sec. 111(a)]

(a) DEDUCTIONS.—Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter.

[Sec. 164]

SEC. 164. TAXES.

[Sec. 164(a)]

(a) GENERAL RULE.—Except as otherwise provided in this section, the following taxes shall be allowed as a deduction for the taxable year within which paid or accrued:

(1) State and local, and foreign, real property taxes.

(2) State and local personal property taxes.

(3) State and local, and foreign, income, war profits, and excess profits taxes.

(4) The GST tax imposed on income distributions.

(5) The environmental tax imposed by section 59A.

In addition, there shall be allowed as a deduction State and local, and foreign, taxes not described in the preceding sentence which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212 (relating to expenses for

production of income). Notwithstanding the preceding sentence, any tax (not described in the first sentence of this subsection) which is paid or accrued by the taxpayer in connection with an acquisition or disposition of property shall be treated as part of the cost of the acquired property or, in the case of a disposition, as a reduction in the amount realized on the disposition.

APPENDIX C

EXCERPT FROM DOD ATLAS—FY 1989

DoD ESTIMATED PAYROLL AND PRIME CONTRACTS BY STATE

(THOUSANDS OF DOLLARS)
FISCAL YEAR 1989

State	Civilian Pay	Military Active Duty Pay	Reserve & National Guard Pay	Retired Military Pay	Total Compensation	Civil Functions Contracts	Military Functions Contracts	Total Contracts
Alabama	789,524	588,907	222,248	498,323	2,099,002	86,857	1,305,531	1,392,388
Alaska	193,392	567,974	24,774	64,562	850,702	17,458	522,337	539,795
Arizona	304,621	589,779	71,806	527,678	1,493,684	11,368	2,835,519	2,846,887
Arkansas	136,907	199,024	71,951	255,818	663,700	38,261	331,331	369,592
California	4,012,634	6,516,801	431,083	2,952,123	13,912,641	60,595	23,064,102	23,124,697
Colorado	363,176	1,008,837	114,248	563,590	2,039,851	6,899	2,921,402	2,928,301
Connecticut	164,690	287,806	49,112	135,908	637,516	1,269	6,081,021	6,082,290
Delaware	47,157	96,153	27,281	64,451	235,042	12,283	158,753	171,036
District of Columbia	564,469	386,633	98,044	66,730	1,115,876	6,652	1,229,312	1,235,964
Florida	1,030,474	2,215,970	153,749	2,092,292	5,492,485	28,356	4,424,027	4,452,383
Georgia	1,030,707	1,731,308	271,133	740,461	3,773,609	34,357	1,829,823	1,864,180
Hawaii	639,481	1,362,357	40,274	191,892	2,234,004	8,018	570,715	578,733
Idaho	34,934	112,486	39,122	98,955	285,497	667	74,122	74,789
Illinois	560,533	729,495	166,545	308,140	1,764,713	30,814	1,218,287	1,249,101
Indiana	456,254	141,030	184,216	185,080	966,580	9,714	1,753,363	1,763,077
Iowa	37,837	9,297	57,692	81,894	186,720	7,897	418,013	452,910
Kansas	180,175	623,131	188,094	192,962	1,162,362	6,754	948,213	954,967
Kentucky	350,445	1,093,166	102,836	210,812	1,757,259	23,573	309,151	332,724
Louisiana	237,848	686,722	111,654	307,564	1,343,788	221,848	1,471,639	1,693,487
Maine	307,916	182,335	31,304	118,118	639,673	385	369,626	370,011

Maryland	1,378,780	898,527	142,181	537,183	2,956,671	26,381	3,844,497	3,870,878
Massachusetts	367,011	283,266	145,629	244,936	1,040,842	13,459	8,744,008	8,757,467
Michigan	367,889	188,637	114,947	213,904	885,377	10,215	1,255,716	1,265,931
Minnesota	87,736	21,762	94,021	126,551	330,070	12,787	1,761,187	1,773,974
Mississippi	312,429	379,785	89,776	234,067	1,016,057	73,868	1,160,690	1,234,558
Missouri	630,224	422,642	187,227	317,805	1,557,989	42,655	6,239,994	6,282,549
Montana	37,566	93,064	26,769	59,910	217,309	2,461	78,075	80,536
Nebraska	113,564	343,581	37,941	125,349	620,435	4,663	217,021	221,684
Nevada	54,035	226,732	19,641	226,554	526,962	36	230,112	230,148
New Hampshire	45,718	99,595	21,008	114,726	281,047	6,722	471,076	477,798
New Jersey	711,011	493,703	145,965	279,003	1,629,682	108,900	3,284,471	3,393,371
New Mexico	290,290	349,384	49,515	261,623	950,812	9,356	615,676	625,032
New York	543,499	749,795	229,372	361,520	1,884,187	5,377	6,546,787	6,552,164
North Carolina	414,439	2,258,954	116,264	671,972	3,461,629	2,414	1,101,328	1,103,742
North Dakota	51,171	224,602	25,501	26,402	327,676	1,299	120,515	121,814
Ohio	1,091,153	342,997	150,893	369,835	1,954,878	15,955	5,053,413	5,069,358
Oklahoma	651,866	696,112	120,537	337,319	1,815,834	17,706	641,409	659,115
Oregon	98,312	22,374	54,359	221,917	386,962	7,013	171,513	178,526
Pennsylvania	1,474,544	224,904	306,218	457,779	2,463,445	63,893	2,764,139	2,828,032
Rhode Island	138,917	147,628	32,271	76,878	395,694	1,130	415,354	417,484
South Carolina	595,656	1,316,068	168,103	526,418	2,606,245	22,585	545,581	568,166
South Dakota	36,369	145,977	23,540	40,741	246,627	1,759	65,667	67,426
Tennessee	190,774	201,973	108,973	397,090	898,374	30,197	1,088,248	1,118,445
Texas	1,849,868	3,258,588	319,561	2,036,072	7,264,089	126,464	9,136,350	9,262,814
Utah	632,384	135,528	98,639	108,005	974,556	13,846	958,799	982,645
Vermont	17,544	1,992	23,798	33,297	76,631	764	162,595	163,359
Virginia	3,479,351	4,154,703	184,847	1,560,075	9,378,976	37,773	5,858,975	5,896,749
Washington	879,416	1,293,047	131,083	725,181	3,028,727	46,395	2,904,660	2,951,055
West Virginia	48,764	9,694	33,283	88,868	180,605	37,775	125,665	163,440
Wisconsin	94,037	23,889	171,867	125,980	415,773	7,361	1,073,428	1,080,789
Wyoming	32,276	81,796	13,199	36,624	163,895	123	67,013	67,136
Total U.S.	27,959,767	38,220,511	5,821,458	20,590,933	92,592,669	1,365,357	118,551,260	119,916,607

Prepared by: Washington Headquarters Services Directorate for Information Operations and Reports

APPENDIX D

EXCERPTS FROM NEW YORK TAX LAW

§ 607. Meaning of terms

(a) General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six [1] (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

§ 687. Limitations on credit or refund

(a) General.—Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return unless such claim is for a credit or a portion thereof pursuant to subsection (e) of section six hundred six of this chapter. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not

exceed the portion of the tax paid during the two years immediately preceding the filing of the claim unless such claim is for a credit or a portion thereof provided pursuant to subsection (e) of section six hundred six of this chapter. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

APPENDIX E

AMERICAN BAR ASSOCIATION

SECTION OF TAXATION

REPORT TO HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED that the American Bar Association recommends to the state legislatures and municipal governing bodies of the United States that they adopt standards for state and local tax procedures that call for: (1) identical statutes of limitations for deficiencies and refunds; (2) identical interest rates for deficiencies and refunds; (3) no automatic imposition of penalties; (4) payment of disputed taxes only after the taxpayer is provided a hearing; (5) no seizure of property until after final adjudication; (6) a period of at least ninety days between the date of the deficiency notice and the date a notice of appeal is due; (7) the elimination of state fees to cover audit expenses; (8) providing taxpayers with due process; and, (9) eliminating the need for taxpayers to relitigate identical legal issues in the same jurisdiction.

REPORT

For many years taxpayers have objected to perceived unfair and arbitrary treatment in compliance, assessment, and appeals of state and local taxes. When taxpayers perceive such treatment, voluntary compliance is seriously threatened. Addressing these concerns should increase respect for the tax system and improve the level of voluntary compliance.

Recent years have witnessed a significant increase in the amount of taxes raised at the state and local levels. For example, for the twelve months ended March 1989, state and local governments collected $488.1 billion—a 6.3 per-

cent increase over the twelve month period that ended March 1988. Increased tax revenues have resulted from tax increases (*e.g.*, rate increases, new taxes, broadening of existing tax bases) and enhanced enforcement of existing tax laws. The enhanced enforcement of state and local tax laws has increased the number of sensitive contacts between taxpayers and revenue collection agencies. The increase in contacts has heightened taxpayers' awareness of tax collection procedures. All of this has focussed discussion on the need for state tax policy makers and legislatures to give serious consideration to the procedural rights of taxpayers.

Consideration has led to very different responses. Some states have adopted procedural reforms through legislation while some states have done so through policy pronouncements from the revenue agency within the executive branch that is charged with implementing the tax laws. Further, some states have created a taxpayer advocate office, similar to the consumer advocate offices created during the 1960s and 1970s. Other differences are the ability to record interviews with auditors and the ability to sue the states. A comparison of all the laws that have passed is beyond the scope of this Report.

In September of 1988, California became the first state to adopt a taxpayers' bill of rights. California's legislation preceded the federal taxpayers' bill of rights. Subsequent to California's adoption, Arkansas, Illinois, Indiana, Kansas, Ohio, Oregon, and South Carolina also adopted taxpayer's bill of rights through legislation. Hawaii, Maryland, New York (state and city) and Texas adopted procedural reforms through policy pronouncements.

Over the years model legislation has been recommended that addressed procedural, due process and policy considerations in the state and local tax area. In addition to these model acts endorsed by the ABA, it is appropriate

to enumerate broad principles to guide state tax policy makers and legislatures.

A review of the procedural reforms adopted by thirteen states reveals that none of the thirteen states have adopted all of the principles recommended.

Specific statutory language is not recommended because it is viewed that: (i) it is almost impossible to draft language to amend or replace existing language that is in many instances scattered throughout the statutory framework of the various states; (ii) some states have already enacted certain of the recommended principles into their statutes and would find statutory language covering additional principles difficult to use; (iii) informal discussions with officials from various states and with national tax organizations reveal that they do not think that statutory language would be desirable in this circumstance; and, (iv) it would be desirable to affect the procedural tax reform process that is currently sweeping the states in a timely fashion.

PRINCIPLES

1. *Statutes of Limitations—Other than Fraud*

   State and local statutes of limitations for assessments, in cases other than those involving fraud, should be the same for deficiency assessments and refunds.

   Federal audit adjustments should open state and local income tax periods which are otherwise closed by statute only for those issues raised in the federal audit.

2. *Interest Rates*

   Interest rates for deficiencies and refunds should be the same. Interest is payment for the time value of money. It should not be imposed at a rate that punishes a taxpayer for failure to pay taxes timely. State and local efforts to encourage timely payment of taxes

and to punish non-compliance should be addressed by penalties and/or civil or criminal sanctions.

3. *Penalties*

There should be no automatic imposition of penalties. Reasons for proposed penalties should be provided to the taxpayer by the taxing agency. The taxpayer should be given an opportunity to appeal, and penalties should be abated upon a showing by the taxpayer of reasonable cause. Penalties should not be enacted by legislatures to raise revenue—they should be designed soley to encourage compliance.

4. *Payment After Hearing*

Taxpayers should not be required to post a bond or make a payment of a disputed tax until they have been afforded an opportunity for a hearing.

5. *Seizure of Property*

A state or municipality should only be able to seize a taxpayer's property or levy against a taxpayer's assets after a final adjudication of the disputed amount or as a result of a jeopardy assessment where the probability of payment would be substantially reduced by the passage of time.

6. *Appeal Period*

Taxpayers should not have to file a notice of appeal until at least ninety days have passed from the date on the notice of assessment. A reasonable period thereafter should be allowed for adequate preparation before a hearing is held and an opportunity should exist for the taxpayer to amend an appeal.

7. *Fees*

Taxpayers should not have to pay the state or local government a fee for its expenses in auditing the

taxpayer. Taxpayers should not have to pay the state or local government's court costs or litigation fees if a taxpayer prevails in a dispute.

8. *Due Process*

Taxpayers should be afforded both an opportunity for a hearing before an independent tribunal and receive an appealable decision therefrom. Taxpayers should also have the opportunity to be represented by counsel and afforded other standards of due process like the use of discovery.

9. *Application of Decisions*

Once the highest court in a jurisdiction rules on a particular legal issue taxpayers should not have to relitigate the identical issue in the same jurisdiction.

COMMENTS ON PRINCIPLES

1. *Statutes of Limitation—Other than Fraud*

The underlying premise supporting civil statutes of limitation is that there is a period beyond which establishing the factual characteristics of a case becomes burdensome, difficult or impractical. This is, likewise, true with regard to issues arising under state and local tax laws.

Several states have statutes of limitation that allow the state and local government a longer period to assess a tax deficiency than the taxpayer has to claim a refund. This is perceived as creating an inequity, particularly when the taxpayer has not committed fraud.

In the area of taxation, the facts needed to establish the taxpayer's correct liability are generally reflected in the taxpayer's books and records. In many instances, taxpayers maintain books and records solely

for the purpose of being able to substantiate prior tax positions. Determining the period of time during which taxpayers should be required to maintain books and records is a subjective matter best left to the judgment of the legislature. However, once a taxpayer has been asked to maintain books and records and to continue being exposed to potential increases related to past tax periods, it seems only fair to require that the government also expose itself to the risk of having to refund taxes erroneously paid for a like period.

Because many states and local jurisdictions use federal taxable income or federal adjusted gross income as a starting point in determining state income or franchise taxes, a federal audit adjustment may trigger the need to file an amended state or local income tax return. Often, the federal audit adjustment is made after the statute of limitation has expired for auditing the state or local income tax return. When this occurs, the federal audit adjustment should not be used by the state or local government as an excuse to audit the taxpayer's state or local income tax return for issues other than those raised in a federal audit.

2. *Interest Rates*

Consistent with the treatment of interest applied to federal income tax deficiencies and refunds, some states and local governments apply a higher interest rate to deficiencies than they pay when taxes are refunded.

This appears to be an unjustifiable position if one accepts the premise that interest should be the payment for the time value of money. Interest should not be used to punish a taxpayer for the over- or underpayment of taxes—this is best done through penalties and other civil/criminal sanctions.

Some commentators have advanced the argument that higher interest rates are justified for deficiencies than for refunds because the state takes a credit risk with respect to the taxpayer's ability to pay the deficiency whereas the taxpayer presumably bears a smaller risk. Some taxpayers, however, are excellent credit risks, on a par with governmental bodies. It is inequitable to apply a higher interest rate to all taxpayers with deficiencies because a few are poor credit risks. If there is a question about a taxpayer's ability to pay a deficiency, seizure of property remedies are available. See comment on seizure of property, below.

3. *Penalties*

In recent years, the imposition of penalties has begun to be used as a revenue raising technique. Many tax jurisdictions automatically add penalty assessments to virtually all tax deficiencies. This is inappropriate if a taxpayer is neither notified of the reasons for the proposed penalties nor provided an opportunity to appeal such penalties. At a minimum, the tax agency should be required to have some basis for the penalty imposition. Further, penalties should be abated upon a showing of a reasonable cause.

4. *Payment After Hearing*

In many instances, taxpayers are required to post a bond or make payment of disputed taxes before being afforded an opportunity for an administrative appeal. This is inconsistent with federal income tax procedure and may often impose a severe hardship on taxpayers, especially when taxes erroneously collected from taxpayers are later refunded at below market interest rates.

5. *Seizure of Property*

Many state and local tax authorities abuse their power to seize property by exercising this power much too

frequently. This power should be utilized only after a final adjudication of the disputed amount or in instances where a designated governmental official determines that the probability of payment (*i.e.*, the collection for a deficiency) would be substantially reduced by the passage of time. The standards utilized to determine whether a jeopardy assessment is appropriate should be similar to those adopted by the federal government for purposes of the collection of federal taxes. Treasury Regulation 1.6851-1(1)(a) sets forth three conditions where a collection is in jeopardy: (i) the taxpayer is or appears to be "designing quickly" to leave the United States or go into hiding; (ii) the taxpayer is or appears to be "designing quickly" to place taxpayer's assets outside the reach of the government by removing, concealing, dissipating or transferring the assets; or, (iii) the taxpayer's financial solvency is or appears to be imperiled.

6. *Appeal Period*

A taxpayer's ability to appeal a tax assessment is basic to providing the taxpayer with due process. The regular delays encountered with mailing assessment notices and the amount of time necessary to evaluate such notices and determining whether an appeal is appropriate require that taxpayers be provided at least ninety days from the date on the assessment notice to file a notice of appeal. Shorter appeal periods often effectively eliminate any opportunity for due process.

As a related matter, once a notice of appeal is filed, taxpayers should be given time to amend such notice in order to perfect the appeal. Otherwise, a requirement that the taxpayer set forth his entire case may in some instances deprive taxpayers of the opportunity to analyze thoroughly the notice of assessment in conjunction with the taxpayer's books and records and other relevant information.

7. *Fees*

Some jurisdictions impose fees on taxpayers for expenses incurred in auditing the taxpayer and for legal costs incurred in defending tax appeals. While user fees may be an appropriate way of funding government services, it is unreasonable to charge taxpayers for the state's audit costs and it is also unreasonable to charge court costs if the taxpayer prevails in a dispute.

8. *Due Process*

Minimum standards of due process should be afforded a taxpayer when a tax is in dispute. Those standards include: (i) the opportunity to appeal an assessment before an independent tribunal; (ii) the opportunity to receive a decision from the independent tribunal which decision can then be appealed to a court; (iii) representation by counsel; (iv) the ability to call witnesses including government witnesses; and, (v) the availability of discovery to all parties.

It is believed that if the first level administrative appeal is provided by a part of an agency that has revenue collection responsibilities, then a de novo appeal should be provided to the taxpayer. In at least one jurisdiction (New York State) the revenue collection agency (*i.e.*, the Department of Taxation and Finance) cannot appeal unfavorable decisions from the Tax Appeals Tribunal to the courts. The concern is that this may have a chilling effect on the willingness of the tax tribunal to rule in favor of the taxpayer on the theory that the taxpayer can always appeal to the courts.

The burden of proof should generally be on the taxpayer, but, irrespective of who bears the burden of proof, the burden should ordinarily be met by a preponderance of the evidence.

9. *Application of Decisions*

State and local governments should establish procedures for implementing judicial resolutions of legal issues. Once the tax authority has lost a legal issue against a taxpayer, before the highest court in the state, there should exist some mechanism for ensuring that similarly situated taxpayers will not be faced with the litigation of legal issues that have already been resolved.

10. *Prospectivity*

There is a strong reluctance on the part of state and local governments to grant tax refunds when a tax has been held to be illegal or unconstitutional. Sometimes, there is a reluctance to refund taxes to the taxpayer litigant, and other times there is a reluctance to refund taxes to all similarly situated taxpayers unless those taxpayers have filed protective refund claims and/or lawsuits. The reluctance to grant refunds provides taxpayers with a disincentive to contest taxes and may serve to erode confidence in a voluntary system of tax compliance.

The issue of whether federal law requires state and local governments to provide taxpayers with retroactive relief when taxes have been exacted in violation of the commerce clause is before the U.S. Supreme Court in the case of *McKesson Corporation v. State of Florida* (October 1989 Term). While the tax authorities' reluctance to part with taxes that have been spent is understandable, the governments should either be prepared to refund taxes or they should escrow disputed taxes. However, no position is being taken on this issue, at this time, pending a review of the forthcoming Supreme Court decision.

Respectfully submitted,

JAMES P. HOLDEN
August, 1990

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NOV 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-673

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,
v.
STATE OF SOUTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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FRANCIS EDWIN BASS, JR., *et al.*,
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STATE OF SOUTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

South Carolina does not, as it cannot, dispute the significance of the federal issue decided by the court below, *i.e.*, the retroactivity, *vel non*, of this Court's decision in *Davis* v. *Michigan Department of Treasury*, 479 U.S. 803 (1989). The importance of this issue is patent: wholly apart from the overriding jurisprudential considerations inherent in the retroactivity/prospectivity question, states are perpetuating the unconstitutional discrimination interdicted in *Davis* by applying that decision prospectively only, thus denying refunds to hundreds of thousands of retired federal employees in over twenty states. When retired federal employees have taken their state law refund claims to state court, the resulting *Davis* retroactivity opinions have left some claimants vindicated (*see, e.g.*, *Burns* v. *New Mexico*, No. SF 89-1314(c) (1st Jud. Dist., Santa Fe County), Letter Decision, April

5, 1990 (finding *Davis* to be retroactive; no appeal taken by state)), and others subjected to cursory dismissal (*see, e.g., Harper* v. *Commonwealth*, No. CL891080 (Cir. Ct. for City of Alexandria), Order, March 12, 1990, *appeal pend'g*, Nos. 900770, 900792 (Va.) (Virginia trial court applies *Davis* nonretroactively)), based solely upon the state in which the retiree happened to live these past few years. *See also* petition 7-10 (describing status of state court litigation). The necessity of Supreme Court review of this issue therefore cannot be seriously disputed.[1]

Rather than challenge the substantiality of the federal question relied upon below, the State proffers interrelated state law claims as supposed obstacles to this Court's jurisdiction. The State's effort to preclude this Court from reaching the paramount federal issue presented here is unavailing.

1. The State primarily argues that this Court cannot reach the issue of retroactivity of *Davis* because the court below relied alternatively upon independent state law grounds. Op. cert. 6-7. Yet the "independent state law ground" doctrine does not bar review where, as here, the asserted state law ground itself generates substantial and important federal questions. Thus, even had the decision below clearly relied upon a bona fide state law ground (despite all evidence to the contrary), this Court would nonetheless retain the power to review all the federal issues generated by the state law interpretations in question.

Regardless of whether the decision below is correct in its *current* interpretation of state law, petitioners pos-

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[1] Indeed, the Attorneys General of many of the affected states have themselves averred the importance of the *Davis* retroactivity issue in the *amicus curiae* briefs filed by them in other retroactivity cases before the Court. *See, e.g., Amicus Curiae* Brief of the States of Virginia, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont and Wisconsin, filed in *James B. Beam Distilling Co.* v. *Georgia*, U.S. No. 89-680.

sessed a cognizable Due Process interest in their *previous* right, clearly expressed in the tax refund statute itself (*see* S.C. Stat. Ann. § 12-47-440), to claim income tax refunds by filing amended returns within three years of payment of the tax. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930). In view of the plain language of the statute, its administrative construction by the Tax Commission, and the prior decisions construing its breadth,[2] this about-face by the South Carolina Supreme Court, like the reversal of refund remedies at issue in *Brinkerhoff-Faris*, extinguished petitioners' preexisting rights and thus denied them Due Process.

Moreover, the state law ground purportedly asserted in the decision below abrogates petitioners' federal right to a "clear and certain remedy" for unconstitutional taxation. *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238, 2251 (1990) (*quoting Atchison T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912)). Again, it is not necessary to second-guess the purported state law interpretation in the decision below, for the record demonstrates beyond cavil that petitioners were not afforded a "clear and certain remedy" for recovery of the disputed taxes. *See* Pet. 18-19 (listing, *inter alia*, petitioners' extensive basis for proceeding under § 12-47-440, and the utter lack of forewarning that they would be relegated exclusively to the "payment under protest" procedures). Given the existence of these federal questions arising from the alleged state law grounds below, the State's argument poses no impediment to review.

2. Not only does the existence of these federal issues remove any obstacle ostensibly presented by state law, they independently merit review by this Court. *McKesson* reiterated the right of taxpayers to obtain "meaningful

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[2] *See Pet.* 18-19 and note 10 (South Carolina Tax Commission affirmatively encouraged petitioners to file for refunds under § 12-47-440; plain language of § 12-47-440 encompasses income tax refund actions). *See also* note 5, *infra*.

backward-looking relief" when a tax is unconstitutional. 110 S.Ct. at 2247. Balanced against this, the Court also explained that states may preserve their ability to "engage in sound fiscal planning" by imposing various procedural limitations including "payment under protest" requirements. *Id.* at 2254. While the Court plainly anticipated that any transition to such "pay under protest" regimes would take effect "in the future" (*id.* at 2257), and apply in "future cases" (*id.* at 2254), some states have attempted to newly impose such limitations on otherwise proper tax refund actions pending at the time *McKesson* was decided.[4] A state's *post hac* invention of additional state procedural requirements is in sharp conflict with the constitutional command that taxpayers be afforded a "clear and certain remedy."

This case is the first to come to this Court construing the remedial guidelines delineated in *McKesson*. Review by this Court is especially appropriate to elucidate the permissible constraints on relief in income tax refund cases such as this.

3. Even aside from the important federal questions engendered by the purported state law grounds referenced in the decision below, respondents' reliance on *Michigan* v. *Long*, 463 U.S. 1032 (1983), is misplaced, as

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[4] For example, in Mississippi, federal retirees had already filed refund claims in light of *Davis* when the State enacted legislation purporting to declare that discriminatory taxes upon federal annuities could not be recovered under the otherwise applicable tax refund statute. *See* Mississippi Code § 27-7-313 (Supp. 1990). In fact, the Mississippi Legislature went even further, requiring federal retirees to pay the discriminatory taxes for the entire 1989 tax year, well after this Court invalidated such taxes in *Davis* in March of 1989. *Ibid.* In Virginia, the Commonwealth has gone so far as to allege that federal retiree refund claims may be denied on the unprecedented basis that Virginia state courts possess complete discretion to deny otherwise proper refund claims for any reason. *See* Appellee's Brief at 29, *Harper* v. *Department of Taxation*, Nos. 900770, 900792 (Va.) (filed November 13, 1990).

there is no "clear and express" statement of "bona fide separate, adequate and independent [state law] grounds" in the decision. *Id.*, 463 U.S. at 1041.[4] *See American Trucking Ass'ns* v. *Smith*, 110 S.Ct. 2323, 2330 (1990) (rejecting assertion that adequate state law grounds independently supported denial of refunds.)

The apparent reliance on state law in the decision below is not "clear," for the court below concludes its decision with an explicit abnegation of reliance on state law: "Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law." Pet. 9a. The state law ground also is neither "bona fide" nor "adequate." As to the observations by the court below that, according to state law, petitioners proceeded under the wrong refund statute and failed to satisfy the "pay under protest" requirement (Pet. 9a), all indications are to the contrary. *See* Pet. 18-19 (South Carolina Tax Commission affirmatively encouraged petitioners to file for refunds under § 12-47-440; plain language of § 12-47-440 encompasses income tax refund actions).

Supreme Court review is not pretermitted where, as here, the purported state law ground is untenable, or is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a

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[4] Contrary to the State's intimation, Op. cert. 2, at no point in the proceedings below did the State either raise, brief or argue the determinative holding below, that § 12-47-440 does not apply to income taxes. *See* Pet. 9a n.5. Rather, it argued, as it still does today (*see* Op. cert. 12-15), that petitioners' rights for refunds of 1985 through 1988 income taxes under § 12-47-440 were extinguished through passage of § 12-47-445 in 1989. *See* Op. cert. 4a (text of § 12-47-445) (purporting to limit § 12-47-440 to non-constitutional challenges). Had this issue been raised, in addition to providing their arguments on this score, petitioners could also have raised the issue of estoppel arising out of the Tax Commission's public advice to federal retirees to utilize the "amended returns" provisions of the code (*i.e.*, § 12-47-440) to protect their refund rights. *See Oswald* v. *County of Aiken*, 315 S.E.2d 146, 150 (S.C. App. 1984); Pet. at 29a-35a.

review of the decision upon the federal question." *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164 (1917). *See also Lawrence* v. *Tax Comm'n of Mississippi*, 286 U.S. 276, 282-83 (1932). This caution fully applies here: the court below did not include any reference to state law grounds until *after* this Court's decisions in *American Trucking Ass'ns* v. *Smith*, 110 S.Ct. 2323, and *Ashland Oil Co.* v. *Caryl*, 110 S.Ct. 3202 (1990), raised serious doubt about the validity of the state court's retroactivity analysis. *Compare* Pet. 8a-9a (post-*American Trucking Ass'ns* decision discusses state law) *with* Pet. 19a-20a (pre-*American Trucking Ass'ns* decision contains no discussion of state law).[5]

Finally, to the extent the court below referred to state law grounds, they could not be "independent" grounds, for the decision on its face reveals a reliance upon the contours of federal law. Specifically, the court below

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[5] While the court below stated that it had previously held that §§ 12-47-210 and 220 were the exclusive means of obtaining income tax refunds, Pet. 9a, this is not so. In fact, the authority cited does not remotely support this proposition. *See Perpetual Bldg. and Loan Ass'n of Columbia* v. *South Carolina Tax Commission*, 180 S.E.2d 195 (S.C. 1971) (holding merely that taxpayer who had reported no income tax due had to pay assessment before instituting a challenge under predecessor statutes to §§ 12-47-210 and 220). Moreover, the court's statement that § 12-47-440 "deals only with the recovery of license fees and taxes," Pet. 9a n.5, flatly contradicts several earlier holdings of the court. *See, e.g., Shasta Beverages* v. *South Carolina Tax Comm'n*, 310 S.E. 2d 655, 656 (S.C. 1983) (granting refund of soft drink taxes under § 12-47-440); *Bobo Brothers, Inc.* v. *South Carolina Tax Comm'n*, 244 S.E. 2d 519, 520 (S.C. 1978) (payment of income taxes is a prerequisite to refund action under § 12-47-440). *See also Slater Corp.* v. *South Carolina Tax Comm'n*, 314 S.E. 2d 31, 33 (S.C. App. 1984) (granting refund of sales tax, holding "Section 12-47-440 provides [for the] application for refund of *any* tax or license fee" (emphasis added)). The only authority cited by the court as precedent for the unavailability of § 12-47-440 here, *City of Columbia* v. *Glens Falls Insurance Company*, 139 S.E.2d 529, 531-32 (1964), involved business license taxes and not income taxes, but did cite the breadth of the predecessor of § 12-47-440 to construe another refund provision narrowly.

sought to calibrate its holding with *McKeeson*'s sanction of procedural limitations upon the exercise of tax refund rights. *See* Pet. 9a. Where, as here, the purported state law ground is "interwoven with the federal law" (*Michigan* v. *Long*, 463 U.S. at 1041), there is no bar to certiorari review. *See, e.g., Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the [state] court's holding is not independent of federal law, and our jurisdiction is not precluded").

4. The State also contends that petitioners' interest in the *Davis* retroactivity issue is "not substantial" because the taxes in question were paid "voluntarily," and "there is no constitutional right to recover taxes voluntarily paid." Op. cert. at 4-6.[6] *McKesson* conclusively dispatches this assertion: if a tax must be paid before it may be challenged, and penalties attend its nonpayment, then payment of the tax is deemed paid "under duress." 110 S.Ct. at 2251 and n.21. A tax paid "under duress" is not "voluntary." *Ibid.* South Carolina's tax refund statutes require payment of a tax before the tax may be challenged (*see* Op. cert. 1a-4a (providing text of South Carolina refund statutes)), and impose penalties for nonpayment (*see* § 12-7-2720); in other words, there is no "predeprivation" opportunity for taxpayers' "objections [to be] entertained and resolved." *McKesson*, 110 S.Ct. at 2251. As summarized in *McKesson*:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

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[6] The court below similarly labored under the misapprehension that "the payments made by the federal retirees were voluntary, not coerced." Pet. 8a n.4.

110 S.Ct. at 2247 (footnotes omitted). Accordingly, the State's belittling of petitioners' federal interest due to purportedly "voluntary" payment of the discriminatory taxes in question is erroneous as a matter of federal law.[7]

CONCLUSION

For the foregoing reasons, and for those set forth in our petition, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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[7] The State also argues that the passage of § 12-47-445 in June 1989 deprived petitioners of any right to seek refunds under state law. Op. cert. 12-15. This contention also is based on the misconception that taxes not paid under protest are voluntary. In any event, this argument was rejected by the trial court (Tr. 88-91), and was not passed upon by the State Supreme Court. Accordingly, it is of no consequence here.